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Truth in the Time of Tumult

Tracing the Role of Official 'Truth-seeking' Commissions of Inquiry in South Africa, from Sharpeville to Marikana

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COMPULSORY DECLARATION

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Abbreviations

ANC	African National Congress
ANC-NEC	African National Congress National Executive Council
CCB	Civil Co-operation Bureau
IDASA	Institute for a Democratic South Africa
JRC	Jamaica Royal Commission
NEC	Native Economic Commission
NGO	Non-Government Organisation
UTP	Unofficial Truth Project
PAC	Pan Africanist Congress
PNUR	Promotion of National Unity and Reconciliation
SADF	South African Defence Force
SAPS	South African Police Services
TRC	Truth and Reconciliation Commission

Abstract

The Marikana Massacre of 16th August 2012 was a watershed moment for post-Apartheid South African politics. News headlines and images depicting an ANC-led South African police killing 44 unarmed miners, striking for a wage increase, ruptured the TRC's official narrative that state violence of this proportion belonged to a bygone colonial, or Apartheid past. Following the massacre, the Marikana Commission of Inquiry was launched as an official inquiry into what was referred to as the 'tragic incidents at Marikana'. However, as the Commission conducted its work its actual role became increasingly ambivalent and ambiguous to the public, as well as to witnesses who testified. Legally, it was a judicial commission of inquiry with a strict fact-finding mandate, yet the official discourse invoked suggests it had additional distinctive aims to achieve 'truth, restoration, and justice', which are functions traditionally associated with Truth Commissions, in the field of Transitional Justice, and more particularly with South Africa's TRC.

This ambiguity in the Marikana Commission's function points to the larger issue that this thesis addresses – the ambiguity in the exact role and function of, as well as the relationship between, generic commissions of inquiry and Truth Commissions. The functions are interrogated using the concept of 'tumult commissions', introduced by Adam Sitze-- a subtype of commission of inquiry used by colonial administrations in lieu of criminal tribunals, to investigate political violence following the State's violent suppression of some major insurgency. Over and above 'fact-finding', Sitze claims that 'tumult commissions' were political tools deployed to 'whitewash' and justify State

killings as unfortunate necessities in order to restore peace and order, and to legitimate the authority of the state.

I anchor the current ambiguity in the role of the Marikana Commission, both in legal capacity, its method and official discourse, in a longer historical trajectory that extends from the Jamaica Royal Commission (1866) to the Sharpeville Commission (1960) and the TRC (1996-1998). The notion of official truth-seeking is problematised using an analytical framework that distinguishes between objective ‘fact-finding’, ‘truth-seeking’ and the various associated narrative genres of ‘tumult commissions’ and ‘truth commissions’. Through a critical analysis of canonic academic literature, official commission reports and legislation, the thesis highlights glaring contradictions and inconsistencies in claims to official ‘truth-seeking’ when combined with quasi-judicial aims to achieve accountability and ‘justice’. It concludes that the ‘truth’ of ‘official’ truth-seeking commissions is always constrained by the overall objectives of the government of the day. Although the TRC was able to promote a more open and inclusive institution to deal with the intractable issues of ‘truth’ and ‘accountability’ following state-sanctioned violence, the cases show that when broader social and economic issues are excluded from the ‘regime of truth’ of official commissions, it only creates fertile soil in which similar tragedies may reoccur in a post-colonial, and post-TRC South Africa.

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Chapter 1: Official ‘Truth finding’ after State Violence

1.1 Introduction

“It is the State which first presents subject-matter that is not only adapted to the prose of History, but involves the production of such history in the very progress of its own being” - Hegel¹

The Marikana Commission of Inquiry was appointed on September 12th, 2012 and in terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996. Its task was to investigate what has been repeatedly referred to as “the *tragic incident*”² on 16 August 2012, when the South African Police Services (SAPS) fatally shot 44 people, and injured over one hundred at the Lonmin mine in Marikana, where miners had been engaging in an unprotected strike demanding a wage increase. The Marikana Massacre presents the worst case of state security forces’ brutality since the African National Congress (ANC) assumed government after South Africa’s first national democratic election in 1994. It rivals the Sharpeville Massacre of 1960, one of the most infamous days of the Apartheid regime, when 69 protesting civilians were killed by the police whilst demonstrating against ‘Passbooks’ that Africans were required to carry.³

¹Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (New York: Dover Publications, 1956), p.61

² Taken from a Proclamation by the President of the Republic of South Africa. No. 50, 2012. (Italics added) Staatskoerant, 12 September 2012 No. 35680. Terms of Reference. Marikana is a mining town located in the North West Province of South Africa.

³The event has been compared to similar historical events in South Africa. As Peter Alexander notes: “In the popular imagination it is something that has its own recognisable label – there was the Sharpeville Massacre (1961), the Soweto Uprising (1976), and now the Marikana Massacre (2012)” See “Marikana, a turning point in South African history,” *Review of African Political Economy*, Vol 40 No. 138 (2013), p. 614

In line with its status as a commission of inquiry, the Marikana Commission had a specific fact-finding mandate: to “inquire into, make findings and report on” the conduct of the main actors involved: Lonmin Plc (Lonmin), the South African Police Services (SAPS) and other key parties. Moreover, it was required to make recommendations to ensure that a “tragedy” of this kind would not happen again.⁴ The investigation into the conduct of these parties was to decipher whether either party “directly or indirectly caused loss of life or damage to persons or property”; or whether actions of these parties contributed towards the creation of “tension, labour unrest or disunity”,⁵ and ascertain whether the “conduct [of the actors involved] was lawful ... reasonable and justifiable in the particular circumstances”.⁶ All these aims are relevant to understanding the Marikana Commission’s ‘fact-finding role’.

The Terms of Reference also presents a characteristic example of a ‘fact-finding’ Judicial Commission of Inquiry;⁷ and it is this ‘fact-finding’ role that reflects the generic mandate of commissions of inquiry in general -- as compared to the more distinctive notion of ‘truth-seeking’. However, the presentation of the Commission to the general public suggests quite overtly that it was concerned with more than simply ‘fact-finding’. This is evident in the motto adopted, which adorned the commission’s online web page and that

⁴At the commencement of the commission other parties investigated included the Association of Mineworkers and Construction Union (Amcu) with focus on its members and officials’ conduct; the conduct of the National Union of Mineworker (NUM); the Department of Mineral Resources and other related government departments. Staatskoerant, 12 September 2012 No. 35680. Terms of Reference.

⁵ Ibid.

⁶Proclamation by the President of the Republic of South Africa, No. 50, 2012. Staatskoerant, 12 September 2012 No. 35680

⁷ There is often a distinction made between a Judicial Commission of Inquiry and other types of Commissions of Inquiry. Whilst the fact that a judge is presiding over the commission may provide an increased air of impartiality that is associated with judicial office, legally there is no distinction between the two. See A. Middleton, "Notes on the nature and conduct of commissions of inquiry: South Africa." *The Comparative and International Law Journal of Southern Africa* (1986), p. 253

was printed on the banners draped up at the Commission's hearings itself: "*Truth, Restoration and Justice*".⁸ Significantly, these terms echo the aims and public discourse surrounding the national Truth and Reconciliation process that became a hallmark of South Africa's transition from Apartheid to democracy. The words on the banner suggest a more specific 'truth-seeking' role for the Marikana Commission. It involves an overt recoupling of the complementary notions of 'truth' and 'justice', which in South Africa have often gone together in sometimes mutually enforcing, but often contradictory and complex ways.⁹

A more substantial indication of the wider mandate of the Commission's work is provided by the closing arguments of the Commission's evidence leader Advocate Geoff Budlender.

"Chair, we submit the first purpose of the Commission is a *truth telling* purpose, that South Africans and not only South Africans, want to know what happened in the terrible week, that terrible week in August 2012 culminating in the killing of 34 people by members of the SAPS. They want to know what happened and they want to know why. The second is an *accountability* purpose. Those who are responsible for what happened must be identified and they must be held to account. The third purpose is a *healing* purpose. Steps have to be taken to heal the terrible wounds which were caused by the events of that week. Truth-telling and accountability will be part of the process of healing but it will take more than that to achieve the healing. And fourthly, there is a purpose of *looking forward*. Having identified what went wrong we need to take effective steps to make sure that this *never happens again*."¹⁰

⁸ This motto is printed on the Commission's logo on the online web page <http://www.marikanacomm.org.za/>

⁹ See André du Toit, "Experiments with Truth and Justice in South Africa: Stockenström, Gandhi and the TRC." *Journal of Southern African Studies*. Vol 31, No. 2 (2005), p. 419-448.

¹⁰ Budlender SC. The Marikana Commission of Inquiry. *Transcript*. Day 294 p. 38494-5 [Emphasis Mine]

These four purposes outlined by Budlender: that of truth-telling, accountability, healing and forward-looking go far beyond the fact-finding role stipulated in the Commission's Terms of Reference and appear to prioritise 'truth-telling' over the 'fact-finding' purpose of the Commission. Indeed they speak to another range of issues that in popular, academic and policy discourse are associated with the role of 'truth commissions', and particularly, the role of the South African Truth and Reconciliation Commission (TRC).

Truth commissions, however, fall within the field of *Transitional Justice*.¹¹ The central question of transitional justice is how the incumbent civilian and democratic regime ought to 'deal with the conflicts of the past' in terms of attaining justice for victims of gross human rights violations, apportioning responsibility (legal, moral) or criminal accountability for harms committed, and to restore trust in a new political order grounded on respect for human rights within a liberal democratic framework. It is concerned with confronting past political crimes as a component of a "major political transformation".¹²

As Budlender's last point identifies, the notion of dealing with the past is viewed as a necessary step towards avoiding such abuses from reoccurring. Hence the name of the report by one of the first ever truth commissions set up (in Argentina) entitled *Nunca Mas*, meaning 'Never again'.¹³ Transitional justice initiatives to confront past abuses include the development of various options: (retributive) justice [perpetrators should be

¹¹Transitional Justice can be described as a theoretical and practical academic field that developed as a response to the various problems countries in Southern Europe, Latin America, Eastern Europe and different parts of Africa faced after experiences of transition from authoritarian rule – in a process referred to term as the 'Third Wave' of democratisation. See Samuel Huntington, *The third wave: democratization in the late twentieth century* (University of Oklahoma Press, 1993)

¹²Louis Bickford, "Transitional Justice", *Encyclopaedia of Genocide and Crimes Against Humanity* (2004), Vol 3, p. 1045

¹³ The National Commission on the Disappearance of Persons (CONADEP) investigated details of citizens who had 'disappeared' during Argentina's dirty war.

criminally prosecuted and punished, as was the case in the Nuremberg Trials], amnesty [perpetrators are officially pardoned or indemnified] or amnesia [past acts of violence should be forgotten, as occurred in Spain].¹⁴ Transitional justice is not an alternative to criminal justice but, to use the words of Alex Boraine, it is “a convenient way of describing the search for a just society in the wake of undemocratic, often oppressive and even violent systems”.¹⁵ The word transitional in this context is also key. It signifies that the “old order is dying but that the new order has not yet been born.”¹⁶

In the context of transitional justice the idea and practice of ‘truth-finding’ is thus concerned both with the unearthing of *knowledge* concerning past political crimes and violations of human rights abuses; as well as serving as official *acknowledgment* of those abuses to restore dignity to the victims. It is in this sense that the notion of ‘truth-seeking’ were raised in the TRC. However, in this instance ‘truth’ was fused with the grand aim of national ‘reconciliation’ – not dissimilar to the Marikana Commission’s idea of ‘restoration’.

Although there is no overt mention of ‘truth-seeking’ in the Marikana Commission’s mandate, it became apparent as the Commission carried out its work that ‘getting to the truth’ behind what transpired at Marikana was regarded as a matter of national importance. Judge Farlam stated during the Commission’s proceedings,

¹⁴See Neil J Kritz, (ed.) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 Volumes (Washington: Us. Institute of Peace Press, 1995); Andrew Rigby. *Justice and reconciliation: After the violence*. (Colorado: Lynne Rienner Publishers, 2001)

¹⁵Alexander L. Boraine, "Transitional justice: A holistic interpretation." *Journal of International Affairs* Vol 60, No. 1 (2006), p. 18

¹⁶Ibid, p. 17

“if ever there was a commission in the history of this country on which the eye of history is focused, this is it... It’s vitally important that we do our utmost to get to the truth.”¹⁷

But exactly what kind of ‘truth’, ‘justice’ and ‘restoration’ was the Marikana Commission attempting to get at? Was it concerned merely with issues of accuracy in ‘fact-finding’ – to find out what happened for an official record, for the eventual purpose of apportioning legal responsibility to perpetrators (what may be referred to as *factual or forensic knowledge*), or was it concerned with a different version of ‘truth-telling’, more in line with the TRC’s victim-centred *truth as acknowledgement*?

Critics of the Marikana Commission accuse it of exonerating the police, charging that it ‘white-washed’ the event, much like the Apartheid-era commissions following the Sharpeville Massacre and the Soweto Uprisings: the Wessels and Cillié Commissions, respectively.¹⁸ The ambivalent aims and objectives of the Marikana Commission of Inquiry raises important questions concerning the role of official ‘truth-seeking’ commissions in democratic South Africa. More especially the Marikana Commission’s claims to seek truth for the purpose of justice, accountability and societal healing leads one to ask how this institution differs from a Truth Commission, as a Transitional Justice mechanism, and specifically the TRC. Moreover, the connection highlights a remarkable and problematic feature concerning canonic literature on ‘truth-commissions’, which tend to view these within a context of transitional justice only and not in relation to Commissions of Inquiry more generally.

¹⁷ Chairperson. The Marikana Commission of Inquiry. *Transcript*. Day 63, p. 6648

¹⁸ See Weizman Hamilton, “South Africa: The Marikana Report: A Whitewash” *Socialist Alternative*. 5 July, 2015 [Online] <http://www.socialistalternative.org/2015/07/05/south-africa-the-marikana-report-whitewash/>

As a Truth Commission the TRC was conceptualized as an institutional ‘tool’ in the transformation of South African society from Apartheid authoritarianism to a democratic society. Those identified as victims of gross human rights violations were invited to tell their stories of human rights violations and seek *official acknowledgement* of victims’ pain to encourage healing, social reconciliation nation-building. However, the TRC combined a strained marriage of a victim-focused truth telling process with a quasi-judicial, perpetrator-focused amnesty process which, according to Andre du Toit, “made for a complex, unstable and in key respects incoherent overall process”.¹⁹ With this thesis I follow Adam Sitze in challenging the Transitional Justice literature that locates the TRC primarily within the recent context of transitions from authoritarian rule and place it rather in relation to the colonial and apartheid trajectory of Commissions of Inquiry. When Judge Farlam stated “if ever there was a commission in the history of this country on which the eye of history is focused, this is it...” he was alluding to the fact that Commissions have been used quite ubiquitously in South Africa’s history. Indeed, Commissions of Inquiry have a long and somewhat ambiguous history in South Africa as official instruments used for ascertaining ‘the truth’ regarding unlawful state killings. There are two related, but distinct, points here: First, official commissions of inquiry are well-established institutions in South Africa that serves as a relevant context for understanding ‘truth commissions’.²⁰ Second, that there is a particular colonial and Apartheid tradition of official investigations designed to establish the ‘truth’ about

¹⁹André du Toit, "A Need for 'Truth'." *International Journal of Public Theology*. Vol. 8, no. 4 (2014), p. 418

²⁰See also Annie Kok and Elrena van der Spuy, "South African Inquiries into Policing 1910-2015" Centre of Criminology, University of Cape Town (2015)
<http://journals.assaf.org.za/sacq/article/view/455/347>

unlawful state killings – a subtype of commission of inquiry that Adam Sitze has termed ‘Tumult Commissions’.²¹

Moreover, the ambiguities and complexities inherent to the TRC’s process and indeed product, appear to have been replicated by the Marikana Commission, its objectives and the eventual Report. Typical of the role of official commissions there is a basic disparity between its claims to ‘fact-finding’ and ‘truth-telling’ concerning political violence, and the report’s effective legitimization of asymmetrical power relations between state agents, as perpetrators, and victims. This assists in explaining some of the confusions in the way the TRC understood its own mandate and indeed its incoherence as an official ‘truth-seeking’ project.

In relation to the first point, that of the history of commissions of inquiry as a relevant context for the ‘truth-seeking’ of the TRC and the Marikana Commission, Adam Ashforth analysed the official discourse of twentieth-century commission reports of state inquiries into what the ruling order at the time called the ‘Native Question’ (later, questions of ‘race relations’).²² Ashforth was concerned with how claims to official knowledge and state power are mutually enforcing and draws attention to the many ‘schemes’ used by official commissions to legitimate their findings, the commission, and the state that authorised it. This will be discussed in greater detail in Chapter 2 drawing on Foucault’s discourse theory and the potential ways in which official ‘truth seeking’ operate within, and in turn

²¹ Adam Sitze, *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission* (Ann Arbor, MI: University of Michigan Press, 2013), p.160

²² Strangely, in this text Ashforth does not discuss some of the more immediate precursors to the TRC that I mention in this thesis, namely the Wessels and Cillie commissions. However there is a list of the Commissions of Inquiry that were held in South Africa between 1960 and 1995 in the TRC report of 1998, Volume 1: 498-508. Adam Ashforth, *The politics of official discourse in twentieth-century South Africa* (Oxford [England]: Clarendon Press, 1990)

can reinforce, certain ‘truth regimes’.²³ Necessary to note at this stage is Ashforth’s assertion that State Commissions were a defining feature of South African state and society formation, particularly in the institutionalisation of racial relations and capital control.²⁴ Critically, commission findings typically only ever reformulated, but did not question the dominant state discourse in any fundamental way.²⁵

Held congruently with the ‘Native Question’ commissions, there was another sub-set of commissions of inquiry, which Adam Sitze called ‘Tumult Commissions’. ‘Tumult Commissions’ were set up with loose mandates of ‘truth finding’ following mass state killings during or following a large insurgency.²⁶ Like the ‘Native Question’ commissions, ‘Tumult Commissions’ were also concerned with ‘race relations’. A key difference between the two sub-types refers to the context precipitating their inception: ‘Native question’ commissions were initiated for the purpose of avoiding racial strife²⁷; whereas ‘Tumult Commissions’ inquired into race relations after they had already led to violence and repression.²⁸

According to Sitze, ‘Tumult Commissions’ were regular features of colonial rule and he presents the Jamaica Royal Commission (JRC) as the archetypal case. This commission

²³Ashforth, Adam. 1990. "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms". *Journal of Historical Sociology*. Vol 3 No.1 (1990), p.1-22; Michel Foucault, "The subject and power." *Critical inquiry*. Vol 8, no. 4 (1982), p. 777-795.

²⁴For the better part of the 20th Century South Africa constituted a socio-political system where the black majority were relegated to the subaltern strata of society in servitude of the white minority capital interests State inquires (like the Native Affairs Commission, Tomlinson etc.) served to provide scientific justification for policies of citizenship, labour and movement for the ‘natives’. Hence, for Ashforth, the specific roles of commissions of inquiry as tools of governance that would intervene at moments of political crisis.

²⁵Ibid, p. 1-2

²⁶ Adam Sitze, *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission* (Ann Arbor, MI: University of Michigan Press, 2013), p.160

²⁷United Kingdom. *Report of the South African Native Affairs Commission, 1903-1905*, p.69

²⁸Sitze, *The Impossible Machine*, p. 161

was established in 1866 to inquire into the violent suppression of the Morant Bay rebellion. In the South African context Sitze tallies twenty-four of these ‘Tumult Commissions’ that were held after instances where the state’s repression of riots, or public disturbances, had led to extra-judicial killings by state agents and prompted the need for official inquiry.²⁹ All of them were officially appointed and guided by fairly open-ended mandates for ‘fact-finding’ and ‘truth-seeking’ regarding the uses and misuses of security forces’ powers, particularly when a state of emergency had been declared. As will be explained in more detail in Chapter 2, the official reports of these ‘Tumult Commissions’ on state massacres was imbued with what Sitze calls the ‘Discourse of Tragedy’. Whilst state officials were legally indemnified from their actions *ex ante* under Martial Law, or Emergency Laws, the *tragic* discourse excused the use of state violence as an unfortunate necessity to enforce law and order. For the purpose of simplicity, it will henceforth be referred to as the ‘tragic discourse of official exoneration’. When one returns to the language with which the Marikana Massacre is being referred to in official terms of reference, the media and the report it too drips with this tragic discourse of exoneration. Possessing neither the unbridled freedom of independent inquiries nor the coercive force of a court of law, Sitze argues that these Tumult Commissions:

“could...in principle...give rise to prosecutions, [but] they were more often substitutes for prosecutions... Under Apartheid South Africa, the more the commissions of inquiry would be created to investigate state massacres, the less they would produce public debate and discussion... Here the Commission of Inquiry *was not a fact-finding device; it was a white washing machine*”.³⁰

²⁹ These include the Bulhoek (1921), Bondelswarts (1923), Witsieshoek (1951), Sharpeville (Wessels, 1960) and Soweto (Cillié, 1976) commissions of inquiry. Ibid, p. 160

³⁰Sitze, *The Impossible Machine*, p. 152.

The idea of an official commission, mandated to inquire into conflicts of the past, being referred to as a ‘whitewash’ implies that rather than objectively uncovering the ‘truth’; ‘Tumult Commissions’ have functioned to obscure the truth. Interestingly, similar accusations have been levied against the TRC. Mahmood Mamdani, for instance, argued that the truth produced by the TRC is best understood as an ‘institutionally produced truth’ where the boundaries of truth-seeking were narrowly defined by political power and aimed at legitimating the power of the incumbent government. In short, Mamdani claimed that the TRC “turned the political boundaries of a compromise in to analytical boundaries of truth-seeking”.³¹ Hence, as an official “truth-seeking” commission, the TRC can be seen as having produced a compromised truth that obscured the larger truth about Apartheid’s violence, its victims, perpetrators and beneficiaries.

The ‘Marikana Massacre’ did not occur under a colonial regime or Apartheid, but in the context of South Africa’s post-Apartheid constitutional democracy. The Marikana Commission, too, had broad aims to achieve some measure of ‘truth’, ‘restoration’, and ‘justice’. In different ways, all these state commissions are official truth projects which made claims to ascertaining the ‘truth’ about conflicts of the past. In general this thesis is concerned with the problem of how these official truth-seeking projects are related. How (if at all) have these ‘truth-seeking’ commissions informed one another’s conceptualizations of truth, their practices of ‘truth-finding’ and the types of truth they eventually produce? As South Africa transitioned from Apartheid, through processes of liberalisation and eventual democratisation, has there been a similar evolution in the ‘truth-seeking’ roles of ‘Tumult Commissions’ pointing to an increased commitment by

³¹ Mahmood Mamdani, "The truth according to the TRC," *The Politics of Memory: Truth, healing and social justice* (2000), p. 177-178

government for self-reflection and genuine problem-solving? Or do they still function as ‘white-washing’ machines telling the official truth the state wishes to legitimate and, in the words of Michael Bishop, “attempts to avoid meaningful action?”³²

1.2 Research Questions

The first main question this thesis will seek to answer is:

What are the various functions of official, “truth-seeking” commissions of inquiry in South Africa, from Sharpeville (1960) to the TRC (1995-2002), to Marikana (2012)?

Clarifying these various functions exposes some significant ambiguities and contradictions in official claims to ‘truth-finding’, particularly with regard to the method by which ‘official truth’ is pursued, as well as the implications of an investigative commission making findings of accountability or responsibility for unlawful state killings. Therefore, the second main question the thesis goes on to ask is:

What are the main issues associated with official ‘truth-seeking’ when official discourse legitimates political violence?

These questions lead to another key distinction integral to the work of this thesis, aside from ‘fact-finding’ and ‘truth seeking’ in relation to official commissions of inquiry and truth commissions, respectively and introduces the notion of the ‘tragic discourse of official exoneration’ that was typical of ‘Tumult Commissions’.

³² Michael Bishop, “An Accidental Good? The role of Commissions of Inquiry in South African Democracy,” accessed September 9, 2015 <http://www.nyislawreview.com/wp-content/uploads/sites/16/2014/11/Bishop.pdf>

1.3 Chapter Outline

Chapter two, that follows, distinguishes commissions of inquiry from other institutional investigatory practices like courts of law or tribunals and expands on the various forms that commissions of inquiry take. I draw primarily on Ashforth's conception of 'Native Question' commissions, Sitze's 'Tumult Commission' and various canonical accounts of 'truth commissions' by scholars of transitional justice, such as Priscilla Hayner. This sets out an analytical scheme that distinguishes between the main functions of commissions of inquiry in terms of their 'fact-finding', 'truth seeking', and narrative functions. At the same time, I introduce the Jamaica Royal Commission of 1866 as an archetypal 'Tumult Commission', and through an analysis of its political context, praxis and findings, as well as the consequences of those findings, I flesh out the conceptual scheme introduced.

Chapter Three analyses the 'truth-seeking' of the commission of inquiry set up to investigate the facts surrounding the Sharpeville Massacre of 1 March, 1960. Considering the Apartheid context, I use the analytical and conceptual framework set up in Chapter Two to tease out what Ashforth referred to as the particular 'legitimizing schemes' used by the Commission to serve a particular political agenda. This chapter draws extensively from the Wessels Commission report tracing continuities and discontinuities with the JRC, and particularly the pragmatic function of the tragic discourse as an official discourse of exoneration on political violence.

Chapter Four analyses the TRC in relation to earlier commissions of inquiry and specifically interrogates the extent to which the TRC, as an official truth commission, challenged the nature of official 'truth seeking' commissions in a way that allowed for a more open and democratic politics of truth concerning conflicts of the past or whether it

remained faithful to Sitze's 'Tumult Commission' tradition that 'whitewashed' and legitimated apartheid's violence. I draw extensively from transitional justice scholars as well as primary legislation and the TRC Report and first-hand accounts of the TRC process by Alex Boraine, Lars Buur and Richard Wilson to trace the stages of the TRC's inner workings.

Chapter 5 offers a final analysis and conclusions considering the more recent Marikana Commission of Inquiry. It interrogates the inherent contradictions in the claims to 'truth', 'justice' and 'restoration' and problematizes them in relation to the Commission's official status as an investigatory commission, and not a court of law. The conclusion aims to highlight residual and persistent dilemmas and ambiguities in the function of 'Tumult Commissions' in democratic South Africa.

Chapter 2: Official truth-seeking after (post-)colonial state violence: institutional formats, discursive phases and narrative functions -- an analytical framework

2.1 Introduction

As Dale McKinley noted in an article published by the *South African Civil Society Information Service*, South Africa “could arguably be called the Commission Capital of the World”.³³ At one point in 2014 there were six official commissions running simultaneously, of which the Marikana Commission of Inquiry was just one.³⁴ Scholars writing on commissions of inquiry in the 1970s such as Chapman, Wraith and Lamb tended to take the mandates and stated objectives of commissions of inquiry (typically that of objective investigation, impartial fact-finding and official advice) at face value.³⁵ However, I propose a critical approach. First, while commissions of inquiry may indeed share certain generic features and functions, one can distinguish different (sub)-types and genres among the variety of commissions of inquiry. Within those types, one can differentiate various modes of official ‘truth-seeking’ such as ‘fact-finding’ or the search for forensic and/or narrative truths. Through identifying the different modes of official ‘truth-seeking, one can also investigate the different functions of commissions of inquiry.

³³ Dale McKinley, “Commission of Inquiry or Omission?” *The South African Civil Society Information Service*. April 14, 2015

³⁴ There was also the *Khayelitsha Commission* inquiring into policing and community safety, a presidential commission into the Arms Deal, a Ministerial Commission into the harsh evictions that took place in Lwandle, a *Competition Commission* investigation into the private ^{medical} industry, and a departmental commission into the collapse of a mall in Tongaat KwaZulu-Natal. These also exemplify the vast range of reasons for which commissions of inquiry may be set up. Because of this diversity, various ‘sub-types’ of commissions are evident; however, they all fall within the general category of ‘commission of inquiry’, ‘official commission’ or ‘state commission’.

³⁵ See for example R.A Chapman (ed), *The Role of Commissions in Policy-Making* (London: Allen & Unwin, 1973) and R.E Wraith & G. B. Lamb, *Public Inquiries as an Instrument of Government* (London: Allen & Unwin, 1971). For more on the history of Royal Commissions see H.M. Clokie & J.W Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Stanford University Press, 1937)

This chapter traces the development of official commissions of inquiry used to investigate *political violence* within processes of colonial and post-colonial state formation. The characterization of *political violence* as the object of inquiry in official ‘truth-seeking’ has implications. The term ‘state violence’ suggests a concern with the actions of state agents, whereas referring to ‘popular insurrections’, ‘insurgencies’ or ‘protests’ includes the agency of non-state agents, indicating a broader scope of official truth-seeking. I use the term ‘political violence’ in a *broad sense* to include political violence committed at the hands of the state and the violence caused by civil insurrection.

Section 2.2 locates commissions of inquiry in historical perspective and draws on institutional formats to highlight some traditional uses and the diachronic evolution of usage. Section 2.3 probes key accounts in the Transitional Justice literature on truth commissions and identifies some of the limitations of prevailing analyses, specifically in the work of oft-cited specialist Priscilla Hayner,³⁶ and considers the discursive functions of official commissions with special reference to Ashforth’s notion of “schemes of legitimation”.³⁷ This prepares the way for a discussion of the legitimating functions of the official discourse of Commissions of Inquiry and their associated narrative genres in section 2.4 with special reference to the tragic discourse associated with ‘tumult commissions’. Finally 2.4 also provides a case study of the Jamaica Royal Commission as an archetypal ‘tumult commission’ as well as its associated ‘tragic discourse’.

³⁶To date Hayner has written many books and articles on the subject of truth commissions. I draw primarily on Priscilla B Hayner, "Fifteen truth commissions-1974 to 1994: a comparative study." *Human Rights Quarterly*. Vol 16 No 4 (1994) pp.597-655; Priscilla B Hayner, *Unspeakable truths: transitional justice and the challenge of truth commissions* (New York, N.Y.: Routledge, 2011)

³⁷ Adam Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms". *Journal of Historical Sociology*. Vol 3 No.1 (1990)

At the same time this chapter sets out to clarify the analytical distinctions between three central conceptual schemes:

- (1) objective fact-finding, relating to the basic mandate of generic commissions of inquiry;
- (2) official truth-seeking, as a distinctive claim made by official investigations into state violence (such as ‘tumult commissions’ and ‘truth commissions’) and
- (3) the narrative function of official inquiries as a genre of discursive practice, differentiating between ‘forensic discourses’, ‘tragic discourses’ and ‘truth discourses’ in legitimating or justifying particular instances of state violence.

The framework rests on two crucial assumptions: that *discourse* forms a system of meaning constituting particular understandings of political life; and that *narrative* takes specific discursive forms, where identifying certain narrative features renders the more general claims about political discourse analysis more context-specific.

2.2. Historical and Analytical Perspectives

2.2.1 Commissions of Inquiry in Historical Perspective

As this thesis’s focus is on commissions of inquiry set up after the state has used excessive force to quell a riot or an uprising, a deeper understanding of their legitimating function, in (re)producing state authority, requires some historical overview. Particularly, in the case of tumult commissions, this involves questions relating to the justificatory functions of commissions and the discursive legitimization of violence enacted by the state to restore law and order. What were the characteristic roles of commissions of inquiry -- as distinct

from the regular exercise of legislative and administrative powers -- in official responses to breakdowns in maintaining order?

Commissions of Inquiry have featured in English law and governance dating back to the 12th century. In medieval England they were variously used as tribunals, to determine legal guilt or innocence, or as investigative instruments when treason or sedition was suspected, or to prosecute those who posed a threat to the Monarchy.³⁸ As Sir John Fortescue, the Chief Justice of the King's Bench, wrote in the 15th century, "the King shall often send his commissioners in great force...to repress and *punish* rioters and risers".³⁹ However, the adjudicative and retributive functions of official commissions dissipated as did the legitimacy of arbitrary monarchical rule.

With the emergence of modern 'governance' during the Enlightenment era, commissions of inquiry became official instruments that sought to manage natural and social phenomena by addressing particular problems of how best to serve the population's welfare and safety.⁴⁰ Following Foucault, Sitze locates these procedures in the context of the increasing prominence of commission of inquiries' 'fact-finding' and 'truth-seeking' roles in the development of specific methodologies of investigation.

"It aimed at knowledge of proximate, immediate and efficient causes [of the problem under investigation] as determined by instrumental reason, their

³⁸ See Clokie and Robinson, *Royal Commissions of Inquiry*, p. 54–79.

³⁹ John Fortescue, *On the Laws and Governance of England*, ed. Shelley Lockwood (Cambridge: Cambridge University Press, 1997), p 98.

⁴⁰ Simply put, modern governance was no longer primarily concerned with defending territory, but with particular administrative functions that governing social life. Foucault calls this a process of 'governmentalisation', where mechanisms of governance refer to both the discursive practices (discourse) and non-discursive practices, like institutions and policy that have informed state formation in mutually enforcing ways. See Foucault, *The Archaeology of Knowledge* (London: Tavistock, 1972); *Madness and Civilisation: A History of Insanity in the Age of Reason* (New York: Random House, 1973); *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1977); "The Subject and Power", *Critical Inquiry*. Vol. 8, No. 8 (1982). University of Chicago Press, pp. 777-795.

necessary and sufficient conditions, and dependent and independent variables, as determined by the natural and social sciences (statistics chief among them).”⁴¹

Sitze’s use of the terms ‘sufficient conditions’ and ‘dependent and independent variables’ associates the procedures of commissions of inquiry with the emergent modes of academic inquiry into social matters, i.e. positivism. Within this paradigm ‘objective truth’ became measured by the reliability of the *method* being utilised.

2.2.2 Institutional formats: generic aspects, institutional and thematic sub-types

From an analytical perspective commissions of inquiry need to be distinguished from other institutionalised investigatory practices such as courts of law, tribunals or practises like investigative journalism. We may also distinguish different institutional and thematic sub-types, like Judicial and Historical Commissions, which share the generic features of Commissions of Inquiry. Different types of investigative bodies have different goals, methodologies and specific criteria as to what constitutes ‘truth’ in relation to their mandated aims even if they in various ways share the basic objective of “fact-finding”. For example, domestic and international criminal trials rely on *legal approaches*, or forensic argumentation, to determine the lawful culpability of the alleged perpetrators regarding specified crimes for purposes of sanction or punishment by due process.⁴² Hence, judicial

⁴¹ Sitze, *The Impossible Machine*, p. 136

⁴² Elster provides a succinct account of the principles of due process, “Adversarial and public hearings; the right to choose one’s own lawyer; the right to appeal; no retroactive legislation or retroactive application of the law; respect for the status of limitations; determination of individual guilt; a presumption of innocence that places the burden of proof on the prosecution; the right to a speedy hearing (justice delayed is justice denied); and the right to due deliberation (justice expedited is also justice denied).” Jon Elster, *Closing the books: Transitional justice in historical perspective* (Cambridge University Press, 2004), p.88

‘truth’ in the context of a criminal trial is determined on the basis of the legally admissible facts of the case. In civil proceedings it is based on the balance of probabilities.⁴³

Whilst accommodating the various degrees of proof necessary to suit different types of cases, only specific types of ‘truth-telling’ are allowed to take place in a court of law. Within the adversarial trial, ‘truth’ is legally framed while the content of testimony must be reconfigured into legal terminology. Robert Van Krieken argues that within the court of law:

“There are no extra-legal ‘truths’ exempted from the juridical gaze and cross-examination, no facts which have any autonomous status, all knowledge is mere testimony in favour of one party or another. All science is merely ‘opinion’, the reliability of any area of knowledge is always open to the court’s critical scrutiny.”⁴⁴

Hence the process by which ‘truth’ is scrutinised according to legally admissible facts informs a particular form of ‘fact-finding’ in the context of the adversarial trial in a court of law or tribunal. As stated in *Spencer v Randal*, the “outcome of a lawsuit”, which is the vindication of legal rights,

“depends more often on how the fact-finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the

⁴³Denning LJ in *Bater v Bater* is worth citing with reference to degrees of proof: “It is of course true that by our law a *higher standard of proof is required in criminal cases than in civil cases*. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. The degree that is required depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion.” Cited in Jan Hendrik de la Rey, *The Fact-Finding Process and the Burden of Proof during Litigation*. Thesis. (University of Pretoria, 2007) p. 96 [Emphasis Mine]

⁴⁴ Robert Van Krieken, “Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu, and Law’s Autonomy” (paper presented at the Law, Power & Injustice: Confronting the Legacies of Socio-legal Research, Law & Society Association Conference, Chicago, 2004) cited in Kate Leader, “Bound and Gagged: The Performance of Tradition in the Adversarial Criminal Jury Trial,” *Philament*, 11 (2007), p. 10

procedure by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied.”⁴⁵

When viewed as a narrative genre, it may be termed a forensic discourse.

Judicial inquiries can be differentiated from Historical Commissions, which may or may not be *official* ‘truth’-seeking commissions. As its name suggests, a Historical Commission focuses on especially significant past events that have impacted on particular groups of people, typically a racial or ethnic group. The significance of a Historical Commission, as distinct from general historical research, is that its findings will have the higher status of ‘official’ truths, especially when set up by the State. The task of a Historical Commission goes beyond merely ‘fact-finding’, by locating its investigations within an interpretive framework appropriate to the purpose for which it was established.

For example, various Historical Commissions were set up across Europe after the Jewish Holocaust by the Central Committee of Liberated Jews in Germany.⁴⁶ Initially these Historical Commissions were not officially authorised but enabled Jewish people to write history from a communal perspective.⁴⁷ The processes may be viewed as allowing victims and survivors to speak ‘truth to power’⁴⁸ against former oppressors and to publicise the

⁴⁵ *Spencer v Randall* 357 US 513 cited in de la Rey, *The Fact-Finding Process and the Burden of Proof*, p. 3

⁴⁶ These Commissions had two aims: first, to amass German anti-Semitic literature, documents and all forms of evidence concerning the details of the Nazi extermination machine. Second, it was to collect survivors' stories, works of art, poetry, literature and Jewish folklore in order to reclaim the Jewish legacy that the Nazi regime had attempted to destroy. See David Bankier and Dan Mikhman, *Holocaust Historiography in Context: Emergence, challenges, polemics and achievements* (Berghahn Books, 2008)

⁴⁷ *Ibid.*

⁴⁸ The phrase “*Speak truth to power*” originates in the 1955 book, “*Speak Truth to Power: A Quaker Search for an Alternative to Violence*,” published by the American Friends Service Committee. It commonly refers to harnessing the power of the people to stand up to authority and has particular resonances in movements advocating non-violent approaches to political and social change. American Friends Service Committee, *Speak truth to power: a Quaker search for an alternative to violence* (1955).

brutality faced within concentration camps across Eastern Europe.⁴⁹ Compared to the *forensic* discourse of tribunals, these Historical Commissions also engaged in ‘fact-finding’ but framed evidence in a narrative of remembrance, commemoration and triumph over adversity for Jewish people. Eventually these various commissions’ findings were incorporated into Yad Vashem, Israel’s official memorial of Holocaust victims and survivors, constituting a public acknowledgement of the ‘truths’ of the Jewish experience of modern anti-Semitism in Europe. The official status of the findings thus allowed not only a space in which victims could speak truth *to* power, but also a way in which they could speak truth *with* power – truth officially sanctioned.

A national truth commission’s mandate is usually broader than both a court of law and an historical commission. Its final report typically includes both individual narratives of gross human rights violation as well as more general analyses of the types and character of such abuses that have defined a period of gross human rights abuses in a country’s history, though typically a truth commission does not seek to prosecute and punish perpetrators of human rights abuses.⁵⁰ Like historical commissions, truth commissions collect witness testimonies (which include but are not limited to the testimony of victims); they can hold hearings in public, and they generally incorporate evidence from various other sources to aid in developing an overall picture of a period of human rights abuses

⁴⁹ In calling for submissions the Historical Commission instructed victims and survivors ‘Write down your martyrology and submit it to us... Remember where and in whose keeping you saw the material; and give us the address... We call to all those who are interested that this dark period in our history receive appropriate illumination and the memory of our martyrs not be lost.’ Cited in Bankier and Mikhman, *Holocaust Historiography in Context*, p. 109

⁵⁰ See Tristan Anne Borer, *Telling the truths: truth telling and peace building in post-conflict societies* (Notre Dame, Ind: University of Notre Dame Press, 2006); Audrey Chapman and Patrick Ball, ‘Levels of Truth: Macro Truth and the TRC’ in Chapman and Van der Merwe (Eds.) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press, 2008), p. 143.

that occurred within a state during a period of conflict.⁵¹ This highlights their function in providing *knowledge* of gross human rights abuses in a country during a specified period. However, for the specific purpose of official truth commissions victim and other testimonies also function to establish *truth as acknowledgement*. The distinction between truth as knowledge and truth as acknowledgment was made by American philosopher Thomas Nagel, in response to the question: what is the reason for official public hearings and reports concerning cases where the facts of past crimes and the identity of the ‘torturers’ are known to the public, and when the torturers are aware that the public know who they are? For Nagel the answer lies in the distinction between *knowledge* and *acknowledgment*.

“[Acknowledgement] is what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene”.⁵²

Within the generic form of commissions of inquiry other institutional formats of inquiry may be identified, e.g. Judicial Commissions - like the Farlam Commission introduced in chapter one. Commissions of inquiry may also be considered according to thematic subtypes such as Ashforth’s ‘Grand Tradition’ of inquiries into the ‘Native Question’, Sitze’s ‘tumult commission’, or the ‘truth commission’ model.⁵³ Curiously the transitional justice literature typically fails to consider ‘truth commissions’ as a thematic subtype

⁵¹ For Hayner, truth commissions assist in producing a “global truth” of the “broad patterns of events” to confirm that atrocities took place and identify the forces that were responsible. She further states, “If [a commission] is careful and creative, it can also go far beyond simply outlining the facts of abuse, and contribute to a much broader understanding of how people and the country as a whole were affected, and what factors contributed to the violence”. *Unspeakable Truths*, p.84

⁵² Thomas Nagel cited in Kritz, *Transitional Justice*, Vol 1, p. 492

⁵³ Of course, there are other thematic sub-types that may include examples like the State inquiry into allegations of procurement fraud and corruption (The Arms Deal) or the commissions of inquiry into policing in the Cape Town suburb of Khayelitsha (The Khayelitsha Commission).

within this conceptual field of commissions of inquiry. In fact, transitional justice literature largely fails to acknowledge the historical antecedents of ‘truth commissions’ as a sub-type of commissions of inquiry into political violence. Locating ‘truth commissions’ in this context will assist in raising critical questions regarding their uses, and the implications of these in understanding their *political and discursive functions* as tools of state legitimization.⁵⁴ The following section begins to explore some of the implications of considering ‘truth commissions’ as a thematic sub-type of commissions of inquiry.

2.2.3 Official Truth-seeking and ‘Truth Commissions’.

Along with the emergence of transitional justice in recent decades as a distinctive practice and field of investigation the novel institution of truth commissions has become virtually synonymous with official truth-seeking in the wake of state violence. However, it should be noted that such truth-seeking need not take the form of an official commission of inquiry. Louis Bickford has documented various types of “Unofficial Truth Projects” (UTPs) which are likewise geared towards uncovering the ‘truth’ concerning human rights abuses committed during a former period, sometimes as part of a broader strategy of attaining a measure of accountability and justice.⁵⁵ These UTPs, intentionally or not, mimic the methodologies and serve similar functions to official truth commissions. Bickford asserts that their official or *unofficial* status adds no substantive level of superiority to the ‘truth recovery’ process.⁵⁶ He suggests that the ‘official’ discourse of a

⁵⁴Ashforth, "Reckoning Schemes of Legitimation", p. 2

⁵⁵ These may be initiated by civil society organizations, like religious organisations, and can be highly effective in terms of uncovering the truth and having far-reaching public interest in contexts where there does not seem to be a plan to institute an official truth commission. UTPs have been effective replacements for official truth commissions in Brazil (*Nunca Mais*, 1984) and Uruguay (*Servicio Paz y Justicia*, 1985), in Guatemala’s Recovery of Historical Memory project led by the Catholic Church, or Northern Ireland (1998), cited in Louise Bickford. “Unofficial Truth Projects,” *Human Rights Quarterly*, Vol no, (2007) p. 994, 1004

⁵⁶ Ibid, p. 994

truth commission means, at a minimum, that it has the power to *declare* it is operating in the realm of “official history” (although whether its findings do actually constitute the ‘official truth’ remains contested).⁵⁷

However, the matter is more complex. As noted in the previous section, the question is not only that of establishing factual truths (hence gaining additional *knowledge* of what happened), but also a matter of finding the appropriate ways to *acknowledge* the past.⁵⁸ The distinction between knowledge and acknowledgement is important as it indicates two different senses of “truth” – truth in a factual sense, which is concerned with a forensic process of truth finding, and truth as acknowledgement, which may be understood as official recognition of the experience of victims.

More specifically, we may consider the functions and objectives of truth commissions. In her seminal work, “Fifteen Truth Commissions – 1974 to 1994: A Comparative Study” Priscilla Hayner described the ‘typical structure’ of a truth commission. This is the definition that is most cited across transitional justice literature centred on truth commissions.

- 1) “That a truth commission focuses on *the past*.
- 2) That it is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses or violations of international humanitarian law, over a period of time.
- 3) That it usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of the report of its findings.

⁵⁷ Louis Bickford, “Unofficial Truth Projects,” *Human Rights Quarterly: a Comparative and International Journal of the Social Sciences, Philosophy, and Law*, Vol. 29, No. 4 (2007), p. 994-1035. For additional reading on contested official history and the work of truth commissions see Deborah Posel and Graeme Simpson (Eds.) *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission* (2002).

⁵⁸ Thomas Nagel, *State crimes: Punishment or pardon: Papers and Report of the Aspen Conference* (1989)

- 4) That it is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report.”⁵⁹

This is evidently an inadequate characterization. At a minimum ‘the past’ would need to be amplified to ‘past political violence’ or ‘gross human rights abuses’. As Mark Freeman noted, truth commissions are indeed concerned with past rather than ongoing or future events, but typically tend to focus on acts of violence occurring “*during recent periods of abusive rule or armed conflict*”.⁶⁰ Moreover, truth commissions can focus on ongoing as well as past violence.⁶¹ Another unclear formulation is Hayner’s assertion that truth commissions are invested with “some sort of authority”. This relates to the distinction between ‘official’ and ‘unofficial truth-seeking’; however Hayner’s requirement of ‘some sort of authority’ does not take Bickford’s ‘unofficial truth processes’ into account.

Hence, while Hayner’s definition may serve as a starting point, it omits some essential characteristics of truth commissions. Her first omission is that truth commissions are, first and foremost, a particular species of commissions of inquiry. Hayner fails to take into account the significant connection between Commonwealth Commissions of Inquiry and Truth Commissions. As Mark Freeman has pointed out, “she does not trace the important connection between the Commonwealth model and the design and subsequent global influence of the South African TRC”.⁶² The Commonwealth Commission of Inquiry model (also called ‘tribunals of inquiry’) originated in the United Kingdom. Underpinned

⁵⁹ Hayner, “Fifteen Truth Commissions”, p. 604 (italics added). Hayner offered other adapted versions in various texts. See Hayner, *Unspeakable Truths*, p. 14

⁶⁰ Mark Freeman, *Truth commissions and procedural fairness* (Cambridge: Cambridge University Press, 2006), p. 15

⁶¹ For instance, a truth commission was set up in the DRC despite the fact the country remained fraught with political violence. Freeman, *Truth Commission and Procedural Fairness*, p. 15

⁶² Freeman, *Truth Commission and Procedural Fairness*, p. 22

by the Tribunal of Inquiry (Evidence) Act (1921) they were authorised to inquire into acts of public mischief or controversial issues within Britain but also in its colonial domains.⁶³

I find Freeman's definition the most appropriate to my analysis of 'truth-seeking' commissions of inquiry set up after state-sanctioned human rights abuses. Freeman affirms Sitze's suggestion that truth commissions should be understood in relation to the long established practice in British Colonies and the Commonwealth to establish 'Tumult Commissions' to inquire into past official violence.⁶⁴ The definition that Freeman offers is as follows:

“A truth commission is an *ad hoc*, autonomous, and *victim-centred commission of inquiry* set up in and authorized by a state for the primary purpose of (1) investigating and reporting on the principle causes and consequences of broad and relatively recent *patterns of severe violence or repression* that occurred in the state during determinate periods of abusive rule or conflict, and (2) making *recommendations for their redress and future prevention*.”⁶⁵

Although Hayner does note that truth commissions exist “temporarily”, Freeman's definition of them as “an *ad hoc*, autonomous and victim-centred commission of inquiry” situates truth commissions within a subtype of commission of inquiry, which he names ‘*Ad hoc* national human rights-related commissions of inquiry’.⁶⁶ This thesis is concerned with both ‘event-specific’ commissions and truth commissions.

⁶³“*Report of the Royal Commission on Tribunals of Inquiry*, (Cmnd 3121 London, 1966). Before the promulgation of commission of inquiry legislation in the UK, most investigations of public mischief were conducted through Select Committees of Parliament. The *Tribunal of Inquiry (Evidence) Act 1921* (UK) – recently repealed by the *Inquiries Act, 2005* (UK) – was passed with the aim of removing the political or partisan elements of public inquiries on controversial events and issues. Blom-Cooper, “Public Inquiries” *Current Legal Problems*, Vol. 46, p.204, (1993) at 206. cited in Freeman, *Truth Commissions and Procedural Fairness*, p. 22 fn 74

⁶⁴ Sitze, *The Impossible Machine*, p. 130-157

⁶⁵ Freeman, *Truth Commissions and Procedural Fairness*, p. xiii. [emphasis mine]

⁶⁶ He also identifies four other types of similar inquiries: “event-specific [that investigate a particular event i.e. police shooting unarmed civilians], thematic [involving a particular issue of social policy, i.e. systemic discrimination against

Another important point relevant to official truth-seeking is that Truth Commissions are “set up in and authorized *by a state*”, and moreover, will inquire into “violations that took place *within the sponsoring state*”.⁶⁷ This holds irrespective of whether the violations were committed predominantly by the state, by non-state actors, or even by a foreign occupying force. If country x appoints a commission investigating violations that took place in country y, then it is not a truth commission.⁶⁸ As Freeman argues, truth commissions must entail some form of self-reflection by the sponsoring state in an attempt to self-investigate and repair in some way.⁶⁹ Elster makes a similar point in relation to transitional justice processes, when he asserts that “in cases of transitional justice, the society is in a real sense judging *itself*.”⁷⁰

This section clarified various institutional formats used for official ‘truth-seeking’. The implication is that different formats also conceptualise ‘truth’ differently, and hence rely on appropriate methodologies to pursue that ‘truth’, i.e. a court of law seeks objective facts relevant to the case following procedures in line with due process, whereas Historical Commissions will accept personal narratives to redefine a period of socio-historical significance as official history. However, common to all formats is the general objective of, and claim to, ‘official truth-seeking’. This would seem to suggest that we can differentiate between various discourses with respect to ‘official truth’ as a particular

a group], socio-historical [investigating a significant period of a country’s history], and institutional [that report on events particular to an institution i.e. an inquiry into racism in the police force]”. Ibid, p. 53-58 [Emphasis Freeman’s]

⁶⁷ Ibid, p.15

⁶⁸ There may appear to be cases where the state investigates actions done by its functionaries in other, neighbouring states. Freeman asserts that the TRC investigated violations committed by state agents in Mozambique and Namibia during the period it was mandated to investigate. Ibid, p. 16 fn 49. However, human rights violations that took place in neighbouring countries were not included in the TRC’s mandate, even if the Report did include these in its background account, and not in its perpetrator findings.

⁶⁹ Ibid, p. 16

⁷⁰ Jon Elster, “Coming to Terms with the Past. A Framework for the study of Justice in the transition to democracy”, *European Journal of Sociology* 39, no. 01 (1998). p. 14

domain, but that within that there will be different discursive domains. The following section unpacks the political significance and function of ‘official discourse on truth’. This requires looking at the relationship between the discursive functions of commissions of inquiry and the problem of legitimization.

2.3 Discursive functions of Commissions of Inquiry

2.3.1 The legitimating function of Official Discourse and the Problem of Legitimation

The relevant notion of discourse as it pertains to this thesis needs to be carefully articulated. It connotes a relatively comprehensive and “systematically articulated ensemble of specific ways and modes of talking about particular areas of social life associated either with certain general *institutions, professions and disciplines* or with certain general ideological and political positions”.⁷¹ Hence I do not use the term to refer to a form of linguistic communication; but rather in the same way that one may colloquially refer to a ‘legal discourse’, a ‘medical discourse’, a ‘feminist discourse’ or a ‘colonial discourse’. It is also important to note that discourses imply a certain social practice, or the social enactment that in turn generates particular discursive domains.⁷² With this in mind, the process of official truth-seeking may be understood to generate its own discursive domain – an official discourse on ‘truth’. However, as there are several different formats and practises of official truth-seeking, it suggests the existence of distinct discourses on truth.

⁷¹ André du Toit, ‘Discourses on Political Violence’ in Manganyi, N.C. and Du Toit, A. eds., *Political violence and the struggle in South Africa* (1990.). MacMillan UK., p. 95

⁷² See M. Finlay, *Powermatics: A discursive Critique of New Communications Technology* (London: Routledge & Kegan Paul, 1987), p. 12.cited in Ibid.

This thesis assesses the function of official commissions inquiring into political violence, more specifically the ways in which the notion of ‘official truth’ is intrinsically linked to the function of legitimating state power. Legitimacy is itself a mercurial concept used in various contexts and indeed, discourses. ‘Legitimation’ may be described as a process by which an act, a practise, discourse or ideology becomes recognised as having normative authority in accordance with particular social norms or values, and has been used to refer to legitimate power or authority.⁷³ Writing about the problem of ‘legitimacy-speak’ in international law, Crawford states that it “has been applied as a loose substitute for legality” and he makes a distinction between that which is lawful and that which is legitimate.⁷⁴ According to Crawford, whilst fidelity to law is assessed by external criteria; the language of legitimacy is “necessarily based on *particular values* and on unilateral or partial appreciations”.⁷⁵ The problem of legitimation then, is that there are no external constraints, except those “imposed by the situations in which action is to be taken, power employed, or military force used”.⁷⁶

Although he was explaining the concept of legitimacy in international law, Crawford’s key point is relevant as he makes reference to how one might judge, or *speak about* an act or practise as legitimate, or not.⁷⁷ Hence, when violence is *described* or posited as legitimate or illegitimate within an ‘official discourse’ I shall refer to this as an *official discourse of legitimation*. The official discourse of legitimation is relevant to understanding Sitze’s

⁷³ Max Weber, for instance, distinguished between traditional, charismatic and legal-rational authority. In any case, legitimacy is garnered through a process of making something acceptable and normative to a group.

⁷⁴ James Crawford, "The Problems of Legitimacy-Speak." *Proceedings of the Annual Meeting American Society of International Law* 98 (2004), p. 271 Accessed January, 8 2016 <http://www.jstor.org/stable/25659936>.

⁷⁵ Ibid. [Emphasis Mine]

⁷⁶ Ibid.

⁷⁷ James Crawford, "The Problems of Legitimacy-Speak." *Proceedings of the Annual Meeting American Society of International Law* 98 (2004), p. 271 Accessed January, 8 2016 <http://www.jstor.org/stable/25659936>.

notion of the ‘tragic discourse’, which will be explicated below. In the context of ‘Tumult Commissions’, it shall be explained how the ‘tragic discourse,’ as used in official commissions, operates to justify the actions of security forces in suppressing the rebellion and whitewash the violence as necessary to restore law and order.

2.3.2 Commissions of Inquiry as Schemes of Legitimation (Ashforth)

The previous sub-section described the historical emergence of Commissions of Inquiry as instruments of modern governance. The question remains as to what their specific uses and function were as instruments of governance? To answer this question I turn to Ashforth’s account of the uses of commissions of inquiry in the South African colonial and post-colonial context. Not only did Ashforth deal with a particular sub-type of commission of inquiry, but he also focused specifically on their legitimating function in terms of the notion of ‘schemes of legitimation’.

In *The Politics of Official Discourse in Twentieth Century South Africa* (1990) Adam Ashforth analysed the functions of Commissions of Inquiry in managing the ‘Native question’ as a central problem facing South African postcolonial administrations in the early 20th century: how to continue using black South African labour in the economy without having to incorporate black South Africans into the political and social life of white South African society by extending full citizenship rights.⁷⁸ In addition to their ‘fact-finding’ role Ashforth highlighted the narrative function of official commissions, positioning them as instruments for generating “official discourse” on a particular issue. His theoretical case study on commissions of inquiry in South Africa included the Cape Native Laws and Customs Commission (1883); the South African Native Affairs

⁷⁸ Ashforth, *The Politics of Official Discourse*, 5

Commission (SANAC) of 1903–1905 and the Native Economic Commission (NEC) of 1930–1932. These commissions constituted what he termed a '*Grand Tradition*' of inquiries into the 'Native question' (later known as questions of 'race relations') in South Africa.⁷⁹ In contradistinction to other official commissions, the six commissions Ashforth studied were unique in that they proposed comprehensive strategies to develop and consolidate state power when there were periods of political or social crisis related to the 'native question'.⁸⁰

Ashforth's book is useful as he explains the way in which 'official discourse' on the 'native question' presented an authoritative way in which one could speak about social life and, hence, organise political subjection.⁸¹ He argued that the 'Native Question' was exacerbated at crucial moments in early 20th century history, resulting from challenges to the underlying assumptions regarding the state-capital relationship, and the way in which the state could speak for, and to, black South Africans. The state's primary means of addressing this problem was via appointing a special commission of inquiry, whose "schemes of legitimation" (comprised of discursive and non-discursive techniques) generated new rationales for state power, creating the logic that supported policies of racial segregation and separate development.⁸²

⁷⁹ Ibid, p.5

⁸⁰ Stephen Ellingson, "The Politics of Official Discourse in Twentieth-Century South Africa. Adam Ashforth." (1991), p. 566

⁸¹ Ashforth, "Reckoning Schemes of Legitimation", p. 17

⁸² He asserts that commissions of inquiry generated "discursive strategies", which form "schemes of legitimation", where these Commissions became symbolic exercises of colonial power. For Ashforth, schemes of legitimation are different from doctrines or ideologies concerning the political path to the good life; instead they "involve the articulation of concrete plans of action to achieve the 'proper'...means and objectives of power" Ashforth, *The Politics of Official Discourse*, p. 8

A practical example of Ashforth's 'schemes of legitimation' in the functioning of commissions of inquiry is the role of 'expert' anthropologists and economists in the NEC, where 'scientific' understandings differentiating 'Natives' and 'Europeans' were developed based on their testimony. The NEC Report thus speaks in the language of economics – ostensibly justifying principles of differentiation based on the theoretical implications of economies being in contact at different stages of development.⁸³

The 'native question' commissions did not make specific 'truth-seeking' claims, but rather presented 'scientific' facts concerning the 'native question'. This distinguished their role as official 'fact-finding commissions', from an official 'truth-seeking' commission. However, Ashforth's notion of schemes of legitimation is useful in understanding the work commissions do in constructing, both deliberately and inadvertently, a framework within which discussion of particular issues proceeds -- setting the official terms of reference for debate. Specifically, 'native question' commissions incorporated the official discourse of 'truth as objectivity' to legitimate and justify policies of segregation and 'separate development' in colonial and post-colonial Apartheid South Africa. The following section shall explain how the process of official discourse formation in the work of commissions of inquiry contributed to their legitimating role.

2.3.3 The Legitimizing Functions of the Phases of Discourse in Official Truth-seeking

The official discourse of commissions of inquiry requires a public setting and process. In principle, private researchers could have devised solutions to the 'native question', after

⁸³ Ashforth, *The Politics of Official Discourse*, p.68-98

which findings could be publicised to inform further policy. But that would not have the authoritative standing and effect of a commission of inquiry. This highlights that the official discourse of commissions entails more than simply fact-finding; it also serves a *narrative* function, adding to their potency as political tools of legitimation. More specifically, Ashforth differentiates three distinct discursive phases in the structured political discourse involved in a Commission of Inquiry's work of establishing 'schemes of legitimation'. He terms these discursive phases respectively the 'investigative', the 'persuasive' and the 'archival' processes involved in official discourse.⁸⁴ These phases encompass a totalising approach to 'the problem' and its solution, with each phase having a particular legitimating function beyond that of 'fact-finding', and contributing to a commission's findings being represented as 'truths'.

The investigative phase typically involves the hearing of testimony from civil society. At this first and earliest stage of its proceedings state commissions engage directly with the public, be that with representatives from civil society, experts etc. From a scientific, or Rankean, perspective oral testimony is an inherently unreliable source of objective truth due to the fallibility of human memory.⁸⁵ This begs the question as to why an institution mandated to engage in objective fact-finding would make such extensive use of testimony to inform its findings. For Ashforth, a commission's public engagement with civil society

⁸⁴ Ashforth, "Reckoning Schemes of Legitimation", p. 6-9

⁸⁵ One of the central Rankean principles states that the purpose of the historian is to properly present what happened in the past, without any moral conclusions or subjective perspectives. This Enlightenment ideal is associated with 'Historicism,' and involves the pursuit of absolute objectivity within a historical narrative. See Stephen Davies, *Empiricism and History* (Houndsmills, Basingstoke, Hampshire; New York: Palgrave, 2003).

contributes to the performance of the commission and functions to present the state as responsive to the needs of society.⁸⁶ It is part of a performance of a ritual.⁸⁷

For similar reasons commissions, although not courts of law, typically strive to follow quasi-legal procedures that mimic legal processes of forensic inquiry. This highlights the highly contingent relationship between the *process* and the *product* of official truth-seeking inquiries, with the ostensibly rational, impartial and scientific procedures of ‘truth-seeking’ serving to provide a certain authority to the findings.

The publishing of the official report entails another ‘discursive phase’, which Ashforth terms the ‘persuasive’ phase of official discourse: when the report is published as the official version of truth.⁸⁸ This ‘persuasive’ phase of official discourse has less to do with objective facts than with expressing what Ashforth refers to as the “truth of power”.⁸⁹ When talking about the ‘Grand Tradition’ of commissions, Ashforth found that the main ‘Truth’ conveyed to the public was a legitimating *idea* – an idea of the State serving the interests of society by listening to them and serving their interests. The ‘archival’ phase of official commissions is the final phase when findings are archived as the official ‘truth’ of that which was under investigation.⁹⁰

⁸⁶ Ashforth, ‘Reckoning Schemes of Legitimation’, p.9

⁸⁷ Hence, engaging in forensic fact-finding through collecting evidence and by hearing testimony forms an integral aspect of the ritualistic performance of the commission as a “theatre of power” and contributes to the ultimate legitimation of the Commission itself, *Ibid.* p. 9-15

⁸⁸ *Ibid.*, p. 16

⁸⁹ For Ashforth, the ‘truth of power’ is that “State power serves the interests of all citizens and is open to their views”. On a symbolic level the appointment of the commission of inquiry is a performance of the government paying “homage to this truth and serves notice of its desire to serve the common interest in the most rational way”. *Ibid.*, p. 12

⁹⁰ Compared to Bickford’s distinction between official and unofficial truth projects, Ashforth’s notion of the “truth of power” is different from the notion of speaking truth *with* power. Whilst the former corresponds with the persuasive phase, the latter is related to the final discursive phase, which Ashforth terms the ‘archival’ phase of official commissions when findings are archived as the official ‘truth’ of that which was under investigation. Objective fact, becomes official truth, and hence is given the status of official history

Despite its claims to ‘fact-finding’, Ashforth further argues that official commissions are purposefully self-limiting. He describes commission reports as representing the state speaking the “truth” about itself; a “truth” which frequently reveals the limits of the possible within a particular structure of state”.⁹¹ Paul Gready notes that Ashforth’s contribution may be compared to Foucault’s understanding of the “institutional production of truth and power”⁹²:

“Each society has its regime of truth, its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as truth; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as truth”.⁹³

In this context Foucault’s notion of a ‘regime of truth’ may serve as an heuristic complementing Ashforth’s account of the pragmatic functions of discursive practices in legitimating an official Commission’s ‘truth-finding’ process, its final product, and the authority of the state that initiated it. Official commissions’ ability to represent ‘the truth’ serve to structure the parameters of political debate and action, or what Foucault called a ‘regime of truth’.

The notion of ‘regimes of truth’ lends itself to an understanding of ‘truth’ as a discursive *genre* in which various discourses may co-exist as discursive practises, as distinct from an idea of ‘truth’ as ‘fact’, or ‘objective truth’”. Understanding these ‘uses’ of Commissions of Inquiry as ‘schemes of legitimation’ suggests that ‘objective’ knowledge may itself form

⁹¹He continues in a footnote: “The political essence of these limits concerns the question of who may speak (and in what ways) within an authoritatively recognized claim to be heard”. Ashforth, *The Politics of Official Discourse*, p.6

⁹²Gready, *The Era of Transitional Justice*, p. 30

⁹³ Foucault cited in Ibid.

a ‘regime of truth’ within a particular rational and moral community. It also opens up another realm of various authoritative claims to ‘fact-finding’ and ‘truth-seeking’, which points directly to the *narrative function* of official commissions.

2.4 Truth-seeking Commissions of Inquiry and their associated Narrative Genres

This section brings us to the particular focus of the thesis in tracing the ‘truth-seeking’ role of official commissions of inquiry set up in the wake of state-sanctioned violence and especially of their legitimating or ‘white-washing’ functions when charged with holding state agents accountable. This will be discussed with reference to the thematic sub-type of ‘Tumult commissions’ and the associated narrative genre of a ‘tragic’ official discourse. As a case study of a ‘tumult commission’ the archetypal Jamaican Royal Commission (JRC) following the Morant Bay Rebellion (1865) is investigated.

2.4.1 ‘Tumult Commissions’ and Tragic Discourse

The notion of ‘Tumult commissions’ as a thematic sub-type of commission of inquiry was introduced by Adam Sitze⁹⁴ and may serve to highlight the ambiguities surrounding the function of the Farlam Commission following the recent incidence of the Marikana massacre of 2012. Unlike Ashforth’s ‘Native Question’ Commissions, set up to gather scientific facts on a particular (administrative) issue or problem, ‘tumult commissions’ are distinctive in that they are set up when the state has been a prime agent in the killing of civilians who challenged the oppressive, ‘unjust’ structure of colonial rule in moments of collective struggle. This adds a significant dimension to the retrospective ‘truth-

⁹⁴ Sitze, *The Impossible Machine*, p. 158-164

seeking' role of 'tumult commissions', as they operate within a discursive scheme where notions of 'truth' become implicated with allocation of responsibility for the perpetrators of political violence. In this connection, we need to consider the legitimating functions between 'truth' and 'responsibility' of the particular narrative structure of 'official discourse'. This is done by applying Ashforth's understanding of official commissions employing 'schemes of legitimation'. The primary question here is how did 'tumult commissions' function as a mechanism to establish the official truth concerning state massacres? Especially, when typically construed, in the narratives of official reports, as a *tragedy* of unavoidable state actions?⁹⁵

Hayden White argues that narrative "entails ontological and *epistemic choices* with distinct ideological and even specifically political implications".⁹⁶ The effect is that the narrative 'choices' construct an 'illusory coherence' upon narrated events, which supports claims to a "secured knowledge of reality".⁹⁷ Narrative representations and their claim on reality is embedded within narrative structure itself, which tends to situate agents within a particular socio-political order, and directs actions towards an end-point fashioning an overall 'meaning', or 'closure' to events; where the 'closure' in fact represents a *constructed* transition "from one physical or social space to another".⁹⁸

⁹⁵ Ibid, p. 171-172

⁹⁶ Hayden White, *The Content of the Form: Narrative Discourse and Historical Representations*. (Baltimore: MD: John Hopkins University Press, 1987), p. ix

⁹⁷ White, *The Content of Form*, p. 81

⁹⁸ Ibid, p.23 See also Claire Moon, "Narrating political reconciliation: Truth and reconciliation in South Africa," *Social & Legal Studies*, Vol. 15, No.2 (2006) p.257-275.

Sitze's notion of the *discourse of tragedy*, or what I call the 'tragic discourse of official exoneration', may be taken as an instance of this. The narrative function of the discourse of tragedy, according to Sitze, was that it was a way:

"...for colonial government to admit to the *illegality* and *inhumanity* of imperial slaughter, while at the same time articulating the *impossibility of accepting legal guilt* or even just legal responsibility for that slaughter."⁹⁹

Thus in the case of the JRC its report typically served as a public document of lamentation and mourning; but simultaneously also served to exculpate alleged perpetrators from legal culpability. Hence the contradictions and incoherence of the 'tragic discourse of official exoneration'. 'Truth as tragedy' operated in a way that may be linked to Ashforth's 'schemes of legitimation', where

"tragedy... emerges as a discourse of power...by which institutions vested with considerable administrative and discretionary power might 'humanize' themselves by 'regretting' or 'lamenting' the fact that they could not act."¹⁰⁰

Sitze argues that, by effectively allowing perpetrators off the hook, these 'tumult commissions' did more to obscure than to reveal the 'truth' regarding the conflicts of the past. Hence, as the archetype tumult commission, Sitze concludes that it "was not a fact-finding device, it was a 'white-washing machine'".¹⁰¹

In Sitze's view the "whitewashing", or exonerating function of tumult commissions is related to both the commission's findings, as well as to the official discourse of the report

⁹⁹Sitze, *The Impossible Machine*, p. 166 [Emphasis mine]

¹⁰⁰ Ibid, p. 148

¹⁰¹ Ibid, p. 157

itself. In most cases ‘tumult commission’ findings “would exonerate the police from any allegations of violence and abuse [and]... would find that the police’s use of deadly force was justified by the necessities of the case.”¹⁰² In relation to Ashforth’s notion of the legitimating role of official discourse in commissions of inquiry, the official discourse of tragedy was indeed a discourse of power that justified the use of violence in the particular context. Conceived as a process of legitimating the police’s use of violence, the discourse of tragedy formed an official discourse of ‘truth’ that was fraught with contradictions and incoherence.

2.4.2 The Case of the Jamaica Royal Commission (JRC)

The following section seeks to clarify the “fact-finding” and “truth-seeking” function in the case of the ‘archetypal’ tumult commission’- the Jamaica Royal Commission (JRC). What did it mean, in the British imperial context of the 1860s, for an official commission to inquire into the ‘truth’ regarding a violent suppression enacted by its own state agents on its colonial subjects? In relation to the function of official discourses of legitimation, the tragic discourse of the JRC ‘white-washed’ the violence committed by state officials as legitimate.

In October 1865 a rebellion led by Baptist Deacon Paul Bogle laid siege to the square outside of the Courthouse in the town of Morant Bay, Jamaica. Legal disputes led to what was perceived as an unjust verdict being brought upon two black men, which caused mass political unrest in the town square.¹⁰³ Martial Law was proclaimed by Governor Eyre and

¹⁰²Ibid, p. 173 See also p. 174-178

¹⁰³ Bogle and his supporters had attended a trial of two black men, one of which involved a dispute over land and trespassing. Another was a case of assault that a women brought against a boy, where the boy was convicted and fined 4s as well as additional costs that amounted to 12s and 6ds. A man in the courtroom disturbed the proceedings over the exorbitant fine that the boy was expected to pay and he demanded that the boy pay only the fine and not

in the days that followed a series of police raids and insurrections by former slaves culminated in a series of insurgencies and counter-insurgency operations in the surrounding districts, resulting in numerous atrocities committed by agents of the British colonial government. These included summary executions, torture and imprisonment of those suspected to have incited or been engaged in the rebellion.

On the one hand, the JRC can be seen as having been set up as an official attempt to address calls among a portion of the British public who were appalled at the way in which the Morant Bay Rebellion had been violently thwarted.¹⁰⁴ Indeed, these events must be seen in the context of the intensification of a specific humanitarian cause growing into and out of the abolitionist movement, which had led to the abolition of slavery in 1807. This is comparable to the modern human rights movement, and it mobilised public support by promulgating accounts of vicious atrocities committed on native people by colonies. This humanitarian movement was led primarily by missionaries, grounded in religious principles and the evangelical objectives of guiding 'natives' towards religious salvation. More specifically the JRC was a response to the 'Jamaica Committee' - a group of British intellectuals led by J.S Mill who challenged Eyre's claims to having *acted legally under martial law* and in terms of the prevailing indemnity acts when ordering executions as well as other tactics of intimidation and retribution.¹⁰⁵

also the additional costs. By order of the Magistrate, the constables arrested the man; however, he was rescued by bystanders. The constables pursued the escaped accused into the square and attempted to seize him, but once again, he was saved by bystanders who beat the constables. Those who perceived the verdict as unjust cascaded into Market Square and retaliated by vandalising property. The police, who were outnumbered, were forced to retreat. United Kingdom, *Report of the Jamaica Royal Commission, Part 1*, Presented to Both Houses of Parliament by Command of Her Majesty (London: Eyre and Spottiswoode, 1866), Chapter 4

¹⁰⁴ See R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford; New York: Oxford University Press, 2005) p. 24, 40-55, 69-76

¹⁰⁵ Sitze, *The Impossible Machine*, 139

The JRC as an official commission of inquiry was eventually mandated to inquire *only* into the “*origin and nature* of the said disturbances, and with respect to the Measures adopted in the course of their Suppression.”¹⁰⁶ It was not a tribunal or court of law empowered to make judicial verdicts with legal standing, nor was it specifically tasked with apportioning any individual or collective responsibility for the “said disturbances”. In practice the JRC, much as in the proceedings of an adversarial trial, was concerned with the truth and falsity of ‘facts’, i.e. with factual allegations pertaining to each case. The JRC held over sixty hearings and over 700 people testified. The Commission’s ‘scheme of legitimisation’ drew from traditional legal procedure, where it sought ‘facts’ pertaining to the uprisings: witnesses were sworn in before their examination and each witness was posed with questions of forensic detail that they were required to answer, guided by the questioner.

9449. Do you remember Thursday morning in the week of the riot at Morant Bay:
-Yes

9450. What were you doing that morning? - I went to the fields as I generally do, and saw a large number of cane-hole diggers and planters all in one gang.

9451. How many? -About 60.

9452. What were they doing; digging cane holes in the estate? - Yes, I found they had left work. That was 8 o' clock in the morning.

9453. Is that the usual time to come off? - No; they come in about 8, or sometimes half past...¹⁰⁷

¹⁰⁶The Jamaica Royal Commission Report, p. 3.

¹⁰⁷ Questioning of witness Thomas Earle, a brown man. *The Jamaica Royal Commission Report*, p. 165

As the above extract exemplifies, witnesses were asked questions that could be verified, such as the time of occurrences, the number of people present, with inquiries into regularities and irregularities in movement. Each witness's testimony was recorded in the report along with other details such as their race, age, occupation and the area in which they lived. The report also contains citations from multitudes of court papers, documents and letters relevant to the administration of justice. As a forensic fact-finding machine the commission was thus able to document that 439 black and coloured people had been killed by British authorities, with the exact number of floggings, destruction of houses by burning and number of political arrests made, and aggregated by district.

As an official fact-finding commission, performing similar investigative functions to a criminal trial, the commission's ostensible impartiality served to legitimate its findings. For example, Governor Eyre had testified that many rioters had perpetrated horrendous crimes of their own towards the authorities. However, in its report the Commission concluded that Eyre's claims were unfounded.¹⁰⁸ Instead the JRC uncovered and recorded instances of atrocities inflicted during the rebellion; its legalistic process of 'fact-finding' and the findings were deemed objective (i.e. 'truth as knowledge') based on the rigorous process by which evidence was scrutinised in a seemingly impartial and objective manner. When compared to the environment provided by a Historical Commission, or by 'Truth

¹⁰⁸ "I have already remarked that the statements of Governor Eyre as to the terrible mutilations and atrocities alleged to have been perpetrated by the black people on the whites prove to have been unfounded. The persons murdered at Morant Bay were in various ways killed or beaten to death; but the brutalities and horrors, which reminded Mr. Eyre of the Sepoy Mutiny, were found to be purely imaginary, as were the vast numbers of plots and conspiracies which in their panic the Governor and his advisors fancied were thick about them.' Jamaica Royal Commission Report, cited in Edward Bean Underhill, *The tragedy of Morant Bay: A narrative of the disturbances in the island of Jamaica in 1865* (Alexander & Shephard, 1895), p. 64-65. United Kingdom, report, Part 1, 40., p. 65

Commissions', the JRC was not a space for public "truth telling", i.e. for witnesses to tell their own uninterrupted stories.

However, a distinctive feature of the JRC as a 'Tumult Commission', unlike the 'Native Question' Commissions, was its 'truth-seeking' function. Apart from its ability to attain 'truth as knowledge', the JRC also performed a key function of 'truth commissions', that of establishing 'truth as *acknowledgment*'. The JRC's report found that the "atrocities that were perpetuated under the shield of martial law" by state agents had "deprived the people, for a longer than necessary period, of the great constitutional privileges by which the security of life and property is provided for".¹⁰⁹ The report stated that the punishments inflicted were "excessive"; that "the punishment of death was unnecessarily frequent"; that the "floggings were reckless and barbarous" and that the "burning of 1000 houses was wanton and cruel".¹¹⁰ Thus the JRC's findings served as an official acknowledgment of the injustice of the state violence that victims had suffered during the rebellion.

In the view of the Jamaica Committee the JRC's findings of fact revealed that there was serious culpability and Governor Eyre should face retribution for his actions before a court of law. But Mill was not merely determined to see Eyre face retribution for mass murder of Jamaicans; above all he was inquiring into the *nature of Martial Law*. At one point Mill compared Eyre to Robespierre, arguing that the issue was whether 'martial law (was) indeed...what it (was) asserted to be, arbitrary power – the rule of force, subject to no legal limits'.¹¹¹ The legal limits which Mill was invoking were the notion of the *morality*

¹⁰⁹ The Jamaica Royal Commission Report, cited in Underhill, *The tragedy of Morant Bay*, p.64-65.

¹¹⁰ Ibid.

¹¹¹ Richard Reeves, *John Stuart Mill: Victorian Firebrand* (Atlantic Books Ltd, 2015), npg

of law founded upon a principled and pragmatic justice. In his passionate response to the JRC's findings, Mill stated:

“Upon [the fact's] showing, the lives and subjects of Her Majesty have been wrongfully taken...and I maintain that when such things have been done, there is *prima facie* demand for legal punishment, and that a court of criminal justice can alone determine whether such punishment has been merited, and if merited, what ought to be its amount. The taking of human lives *without justification*, which is in this case an admitted fact, cannot be condoned by anything short of a criminal tribunal. Neither the Government, nor this House, not the whole English Nation combined can exercise pardoning power without previous trial and sentence. I know not for what more important purpose Courts of Law exist than for the security of human life... But if officers of the Government are to be allowed to take the lives of the Queen's subjects *improperly* – as has been confessedly done in this case - without being called to judicial account, and having the excuses they make for it sifted and adjudicated by the tribunal in that case, we are giving up altogether the *principle of government by law*, and resigning ourselves to arbitrary power”.¹¹²

Mill's appeal that Eyre be criminally prosecuted, despite having acted under martial law, points directly to issues that transitional justice scholars would reckon with one hundred years later - the question of whether, and how, to punish what Kant called “radical evil” *even if* those ‘crimes’ were legal under the laws of the state at the time at which they were committed.¹¹³ However, in this extract Mill also touched on another crucial point in understanding the work of ‘Tumult Commissions’ when he stated “I know not for what more important purpose *Courts of Law* exist than for the *security of human life*...”. This is the issue of sovereignty and in particular, the distinction between *legal* and *political*

¹¹² Hansard Parliamentary Debates, 3rd Ser, vol 184 (1866), cols. 1798-1800, cited in Sitze, *The Impossible Machine*, p. 145

¹¹³ See Carlos Santiago Nino, *Radical evil on trial* (Yale University Press, 1998)

sovereignty. For Mill, the ex-ante or post-facto indemnification of acts of brutality was a clear act of unchecked political sovereignty which, to him, amounted to arbitrary power and was wholly inconsistent with the principle of legal sovereignty, or the rule of law. In its attempt to ‘come to terms’ with the perceived injustice, the JRC, contradicted its own fact-finding, and official acknowledgment of atrocities. Its official narrative of ‘tragic’ necessity effectively served to *justify* the taking of lives, while the indemnity, as proclaimed by Martial law, obliterated the lines between political and legal sovereignty. In the case of the JRC the legitimating and exonerating functions of the narrative genre of the ‘tragic’ discourse served to legitimate the actions of the security agents, and exonerate the perpetrators of violence from criminal prosecution. Moreover, within the master narrative of the Commission, it breathed life into the ‘*tragedy*’ of what transpired at Morant Bay by supplying the true facts and figures of the ordeal, whilst maintaining that the security forces had acted out of unfortunate necessity, and hence no one was to blame.

The ‘regime of truth’ within which the JRC operated also determined the limits of the prevailing humanitarian discourse in the particular colonial context. The commissioners ruled that according to law and practice, martial law was an established tradition and that it had been “proclaimed upon good reasons”.¹¹⁴ Hence, the indemnities were construed as legitimate and there was nothing to prosecute. From this perspective, the findings of the commission discursively and officially removed the possibility of legal action. Rather the impartial findings arrived at through legalistic procedure, as well as the narrative function

¹¹⁴Charles Bower Adderley quoted in Sitze, *The Impossible Machine*, p. 146

of the *tragic discourse* exonerated the actions of the security forces by the narrative that the atrocities were necessary and legitimate in their objective to restore social order.

2.5 Conclusion

This chapter considered the various scholarly accounts of the functions of official commissions of inquiry using an organising scheme that distinguished between ‘fact-finding’, official ‘truth-seeking’ and narrative role, particularly in legitimating the state’s contested authority in colonial and post-colonial contexts. Ashforth’s notion of ‘discursive schemes of legitimation’ assisted in clarifying how the *procedure* of gathering facts has particular relevance to the type of truth a commission authorises. Moreover, using the example of the NEC, it was explained how particular discursive schemes removed certain issues of social importance from the realm of political debate and presented them as matters resolved by scientific reason. To use Foucault’s terminology, official commissions operate in a ‘regime of truth’ in which speaking truth means speaking ‘truth’ as objectivity.

The JRC’s procedure was comparable to Ashforth’s ‘schemes of legitimation’ and the ‘Native Question’ Commissions, as it too followed legalistic procedures of the adversarial trial to authorise its findings. However, the JRC also revealed the potency of narrative relevant to understanding ‘tumult commissions’ in Colonial and post-colonial South Africa. The JRC’s mandate questioned the necessity of the police’s use of force in suppressing the Morant Bay rebellion, while its findings confirmed that the counter-insurgency tactics had indeed been excessive. However, the overall narrative - the tragic discourse of official exoneration – had a particular operative role in colonial societies. It rendered the force of martial (indemnity) law legitimate thus blurring the distinction between legal and political sovereignty. Within the particular ‘tragic narrative’, although

admittedly harsh, the state's actions were justified as having been necessary to restore order to society. Linking this to Ashforth's notion of Public Commissions presenting an idea of the state; the "tragic narrative" entrenched the idea of the State as having acted in the best interest of the population's welfare and the ultimate safety of the population. The "whitewash" of the event is its effective painting over of 'what actually happened' with a narrative. 'Tragedy' is then the story of the loving and caring state that was reluctantly forced to resort to such violent deeds by necessity.

The ambiguous findings of the JRC are significant in highlighting the ambivalent and contradictory functions of the official discourse of 'Tumult commissions'. On the one hand, there is the objective of making impartial, neutral or scientific findings of fact regarding the specifics of the 'event' under investigation. On the other hand, there is a sense in which the findings can never be neutral due to their inherently political mandate – which is to restore society to a particular social order. Moreover, the effect of using the discourse objectivity in the official report was to legitimate its 'fact-finding' and hence 'truth-seeking' project. In the end, however, the JRC undermined the prospect of accountability for the state officials, despite whose violence was publicly acknowledged as "wanton and cruel".

Chapter 3: Tumult Commissions in South Africa and the case of the Wessels Commission of Inquiry, following the Sharpeville Massacre.

3.1 Introduction

The historical and political context of Apartheid South Africa was radically different to the colonial context of the JRC. The formation of the Union of South Africa in 1910 led to the development of a centralised state under white minority rule, where racial segregation was the official policy until 1948, when the National Party (NP) government was elected committed to the policy of apartheid. By 1948 no Africans, the majority racial group, had the franchise.¹¹⁵ While pre-1948 segregation largely relied on informal practices, the Apartheid regime brought the systematic elaboration of explicitly racial legislation discursively supported by white supremacist ideologies of legitimisation. This thrust South Africa into a unique regime of partial enfranchisement; a system in which mechanisms of political and social control were geared towards maintaining white-minority rule and economic privilege. The face of political control was hence overt force complemented by legalistic techniques of public policy and administration. As mentioned in the previous chapter, commissions of inquiry were used ubiquitously as tools by which political control was rationalised in the public sphere in colonial and indeed post-colonial South Africa.

In terms of Ashforth's 'Grand Tradition' of commissions of inquiry, state commissions intervened at moments of political tension to seek a 'solution' to a critical *problem* of governance. Moreover, the Commission's public investigation formed part of a ritualised

¹¹⁵ Although, until 1936 Africans in the Cape Province were on the common roll.

performance whereby the display of a seemingly objective investigation served to authorise the consequent ‘solution’, presented in the commission’s findings as fact. The public function of a commission’s ‘investigative phase’, according to Ashforth, was to facilitate the establishment of ‘discursive schemes of legitimation’. Hence, the ‘native question’ commissions of inquiry followed specific procedural and discursive rules that contributed to their findings being presented to the public as objective truth in official discourse.¹¹⁶ This corresponds to Sitze’s notion of the ‘tumult commission’ as exemplified by the 1866 Jamaica Royal Commission (JRC). Running concurrent to, and hence comparable with, the ‘native question’ commissions, ‘tumult commissions’ investigated instances where the colonial police and/or military forces had brutally suppressed a riot or rebellion. According to Sitze, ‘tumult commissions’ functioned discursively by exonerating the police force from any form of criminal liability for their unavoidable use of lethal force. Typically the accounts provided in the reports of ‘tumult commissions’ were mired in the discourse of tragedy.¹¹⁷

This chapter assesses the function of the Wessels Commission of Inquiry set up in 1960 to inquire into the South African Police killing of 69 people in what is known as the ‘Sharpeville Massacre’. The ‘Sharpeville Massacre’ was a response to the *Pan Africanist Congress* (PAC)-led campaign opposing the statutory requirement on African males to carry ‘Passbooks’.¹¹⁸ The Pass laws were a key mechanism by which the ideological

¹¹⁶ Ashforth, *The Politics of Official Discourse*, p. 8

¹¹⁷ Sitze, *The Impossible Machine*, p. 163

¹¹⁸ The Populations Registration Act No 30 of 1950 provided that “Every person whose name is included in the register shall be classified by the Director as white person, a coloured person or a native.” Section 5 (1), and the 1952 Natives Abolition of Passes and co-ordination of Documents Act required African men to carry ‘reference books’ containing information on their place of birth, employment information, tax information, and encounters with the police.

construction of 'Grand Apartheid' was implemented as the Apartheid regime's policy of 'separate development'. In practise the Pass laws served to relegate Africans to designated Homelands (the 'Bantustans') whilst only being allowed into 'white' South Africa with a work permit or some other form of special permission.¹¹⁹ Beyond their rudimentary function of recording basic personal information, Passbooks became emblematic of the enduring indignity of Africans' systemic oppression and the target of sustained resistance to Apartheid repression.¹²⁰ The demands of the protests in 1960 were the abolition of the pass laws and a call for a minimum wage of £35 per month; a mass peaceful protest was planned where participants would present themselves for arrest by burning their pass books. The slogan was "*no bail, no defence, no fines!*" The anti-Pass Campaign was planned to launch on 21st of March 1960 and to last until 1963. However, the campaign was violently thwarted when the police fired 1 344 rounds into the crowd, killing 69 people and wounding 186.¹²¹ The Government declared a state of emergency and the Wessels Commission of Inquiry was set up some days later to inquire generally into the facts surrounding the police killings.

In contemporary discourse it is the Sharpeville Massacre, together with the Soweto Student Uprisings of 1976, to which the Marikana Massacre has been most often

¹¹⁹ See Philip Frankel, "The politics of passes: control and change in South Africa", *The Journal of Modern African Studies*, Vol. 17, No.02 (1979), p.199-217.

¹²⁰The use of passes as means of oppressive population control is dated back to 1780 when slaves at the Cape were required to carry passes that authorized their movement between towns and within the Country. Despite Ordinance 20 of 1828 the pass system persisted in the Boer Republics of Natal; hence when the Union was established this particular form of influx control was weaved back into the new political framework. In anti-apartheid struggle 'passbooks' became a symbol of resistance against systemic oppression. See Frankel, "The Politics of Passes", p. 201

¹²¹For a comprehensive account of the Sharpeville Massacre see Frankel, Philip. *An ordinary atrocity: Sharpeville and its massacre* (Yale University Press, 2001) and Lodge, Tom. *Sharpeville: an Apartheid Massacre and its consequences* (Oxford: Oxford University Press, 2011)

compared.¹²² Less attention has been given to the mechanisms, such as Commissions of Inquiry, by which the state sought to investigate and legitimate these instances of violence. The literature is largely silent on how the official commissions of colonial and post-colonial, Apartheid and post-Apartheid commissions of inquiry may relate to one another. This chapter considers the political functions of the Wessels Commission in relation to the tradition of ‘Tumult commissions’ identified by Sitze. Distinguishing between the explicit and less overt roles of official commissions, I assess the functions of the Wessels Commission in terms of Ashforth’s legitimating schemes: ‘fact-finding’, ‘truth-seeking’, and the ways in which the Commission operated to espouse an official narrative on the Sharpeville ‘*tragedy*’. More specifically, it assesses the extent to which the ‘tumult commissions’ of Apartheid South Africa may be compared with colonial ‘tumult commissions’, like the JRC, that ‘whitewashed’, or justified unlawful state killings as regrettable necessities.

3.2 The Legal fetishism of Apartheid’s repressive order.

The Apartheid regime was a peculiar hybrid of sustained white minority domination on the one hand, but with all the ‘democratic’ trimmings of civil courts, a parliamentary system of government, and a seemingly independent press on the other. It went to great lengths to elaborate and sustain this intricate legalistic façade, aptly described by Mamdani as exhibiting “a legal fetishism”.¹²³ The bulk of Apartheid’s definitive legislation

¹²²In most cases these comparisons are centred on the structural oppression creating untenable conditions, to which Africans responded through collective action. In all cases, the State responded with lethal force. See Richard Stupart, “Why Marikana is our Sharpeville” 23 August, 2012; “Soweto 1976 and Marikana 2012, any similarities?” <https://afrolegends.com/2013/06/18/soweto-1976-and-marikana-2012-any-similarities/>

¹²³Mahmood Mamdani. “The truth according to the TRC.” *The Politics of Memory: Truth, healing and social justice* (2000), p. 180

was enacted during the 1950s: The Populations Registration Act (1950)¹²⁴ classified the population into three distinct race groups that afforded or denied each race particular citizenship rights; it restricted the freedom of movement and residence for Coloured and African South Africans, which in turn limited economic and labour opportunities. The Act was met with a civil disobedience campaign known as the ‘Defiance Campaign’, led by the African National Congress (ANC). However, the NP government only retaliated with further racially restrictive legislation. The Natives Labour (Settlement of Dispute) Act of 1953 prohibited Africans from engaging in any labour-related strike action. The Criminal Law Amendment Act of the same year provided that anyone who was accompanying or supported someone found guilty of offenses committed during political protests, or that supported campaigns against Apartheid Laws, would be presumed guilty and the responsibility would be on them to prove their innocence.¹²⁵

Further legislation relating to “riotous assemblies” was passed in 1956 prohibiting actions that stimulated “feelings of hostility between the European and the non-European inhabitants of the Union and matters incidental thereto”.¹²⁶ Anyone seen to have acted in contravention of this Act would be “guilty of an offense” and be liable on conviction to imprisonment.¹²⁷ In addition, the Public Safety Act of 1953 provided government the authority to declare a state of emergency at will. A state of emergency would effectively suspend civil liberties and it permitted either the Minister of Law and Order, the Commissioner of the South African Police, a magistrate or any commissioned officer to

¹²⁴Act No 30 of 1950

¹²⁵Act No. 8 of 1953

¹²⁶ The Riotous Assemblies [Amendment] Act No. 17 of 1956

¹²⁷ The Riotous Assemblies [Amendment] Act No. 17 of 1956, Section 4(a)

detain, without trial, any person for the objective of “public safety”.¹²⁸ Such a state of emergency was declared in the days following the Sharpeville Massacre, and in 1961 an indemnity law was passed that indemnified state actors acting either under government’s or their own authority from an act done “in good faith for the suppression of internal disorder” or the “preservation of life or property”.¹²⁹ This Act effectively indemnified the Apartheid security forces’ brutal actions while enforcing a state of emergency. As was noted in Chapter 2, indemnity laws formally obliterate the distinction between legal and political sovereignty which, as Mill articulated during the JRC in 1866, is the marker of unchecked political power.

This hyper-legalistic environment corresponded with the complex nature of repression, which Tina Rosenberg termed a ‘criminal regime’ as distinct from a ‘regime of criminals’.¹³⁰ The distinction depends on whether the ‘crimes’ committed were committed by state agents acting un-officially / outside the law or systemic in character. In the case of a ‘regime of criminals’ there is a clear distinction between perpetrators, victims and beneficiaries while in the case of a ‘criminal regime’ the ‘crimes’ themselves were officially sanctioned and therefore ‘legal’ at the time they were committed. In the latter case the distinction between perpetrators, victims, beneficiaries and bystanders is more complex

¹²⁸ Public Safety Amendment Act. Act No. 67, 1986. No. 10314. Section 5A (1) ‘Whenever the Minister is of the opinion that public disturbance is occurring or threatening in any area and that measures additional to the ordinary law of the land are necessary to enable the Government... institution to ensure the safety of the public or the maintenance of public order or to combat or prevent such public disturbance, disorder, riot or public violence, he may, by notice in the Gazette, declare such an area to be an unrest area’. This declaration of an area as an ‘unrest area’ would remain in force for three months, unless withdrawn by the Minister.

¹²⁹ “To indemnify the Government, its officers and all other persons acting under its or their authority in respect of acts, announcements, statements or information advised, commanded, ordered, directed, done, made or published in good faith for the prevention or suppression of internal disorder or the maintenance or restoration of good order or public safety or essential services or the preservation of life or property in any part of South Africa included in the Republic or the termination of a state of emergency in certain areas included in the Republic, and to provide for matters incidental thereto”. The Indemnity Act 61 of 1961

¹³⁰ Tina Rosenberg, “Overcoming the legacies of dictatorship,” *Foreign Affairs*(1995) pp.134-152.

as silent yet assenting beneficiaries and collaborators may have significant roles in the regime's persistence. Rosenberg's distinction brings out the key differences between Latin American dictatorships, and the experience of Eastern European communist regimes.¹³¹ Her distinction is useful in considering the Apartheid regime as a 'hybrid' regime, as it was characterized by legalistic structures as well as by a web of collusion by state institutions, individuals and the Private Sector alike, similar to Eastern European 'criminal regimes', but also engaged in illicit and secret operations, of counter insurgency, like the Latin American 'regimes of criminals', to ensure regime survival.

However, by 1960 South Africa was increasingly confronted by an international network of states that condemned Apartheid laws and practice. Apartheid's policies of racial exclusion were challenged vehemently both locally and abroad, particularly following the Second World War with the establishment of the United Nations.¹³² The defeat of Nazi Germany in the Second World War and subsequent revelations of the abhorrent treatment of Nazi victims and the Nazi ideology of racial superiority led to the drafting of new human rights treaties -- the UN Charter and the recognition of the Declaration of Human Rights.¹³³ Hence, as news of the Sharpeville massacre spread to international audiences it precipitated substantial withdrawals of international investment, which threatened a severe economic crisis. South Africa left the British Commonwealth in 1961;

¹³¹ Rosenberg's distinction is also relevant to analysing the form of transitional justice bodies set up in the wake of transitions from different forms of authoritarian rule to democracy, particularly in the way that new democracies in certain cases give primacy to 'truth' over individualized retributive justice as an appropriate channel to address conflicts of the past.

¹³²See Stanley B Greenberg, *Legitimizing the illegitimate: State, markets, and resistance in South Africa* (University of California Press, 1987) Chapter 6

¹³³The end of the Second World War also precipitated the Nuremberg tribunals and Tokyo trials, representing international attempt to prosecute perpetrators of gross human rights violations. See Kathryn Sikkink and Kim Hun Joon, "The Justice Cascade: the origins and Effectiveness of Prosecutions of Human Rights Violations," *Annual Review of Law and Social Science*, Vol. 9 (2013), p. 270

a reflection of the NP government's tenacity to maintain Apartheid in the face of domestic and international condemnation. In this particular context, Apartheid ideology and apologists of the Apartheid state rationalised official policy in terms of 'Separate Development' in an effort to legitimate "the illegitimate". As Stanley Greenberg commented in his book on Apartheid South Africa entitled *Legitimizing the Illegitimate*:

"Few states operate within a legal and ideological framework that appears to mandate dependence on direct coercion and preclude the search for more consensual methods. ... There is a completeness to a repressive order that, at the top, leaves the African majority without any legal political representation or national identity and, at the bottom, subjects them to "group areas", "tribal authorities," and police raids of various sorts. The African majority, formally outside the dominant political arrangements and the subject of such repressive policies, have affirmed in practice what seems necessary in theory - the illegitimacy of the South African State."¹³⁴

Greenberg's depiction captures the totality of the Apartheid state's repressive character concretising the legalistic fetishism of the laws cited above. What the Sharpeville shootings exposed was that, contrary to the ideological claims of 'Separate Development', the Apartheid regime did both resort to, and depended on, the exercise of arbitrary coercive power and state violence to maintain minority rule.

3.3 The Powers of Commissions of Inquiry in Apartheid South Africa

In order to effectively "legitimate the illegitimate", in the case of the Sharpeville mass killing of civilians by state agents, the status of an official commission as a credible and authoritative public institution was required. In apartheid South Africa commissions of

¹³⁴ Greenberg, *Legitimizing the Illegitimate*, p. 3

inquiry were no longer appointed by the Queen, but by the South African Governor-General. Technically the commissions set up in South Africa were not 'Royal Commissions' but Commonwealth Commissions, as defined by the (British) Tribunal of Inquiry (Evidence) Act of 1921; and later, the South African Commissions Act of 1947.¹³⁵ However, the powers conferred by both Acts are strikingly similar in terms of the discretionary powers of Commissions they authorise, and the powers of the Commission to subpoena witnesses and evidence relevant to fulfilling its mandate. Generally, Commonwealth Commissions have subpoena powers as well as the discretionary power to hold their hearings either in public or in camera.

Whether implicitly or explicitly, most South African Commissions adopted the 'Royal Commission' as their model, where due to their considerable discretionary powers they could define their own procedures and hence render particular legal provisions irrelevant.¹³⁶ This point is of critical import in tracing the various functions of 'Tumult Commissions' in South Africa. It suggests that although individual commissions of inquiry may be set up for specified reasons, supported by relevant legislation and guided by a particular mandate, they also *can* and do draw upon and repeat techniques and practices utilised by past Commissions, and so derive legitimacy from established historical practices. Hence, Sitze claims that South African 'Tumult Commissions'

¹³⁵Royal Commissions used to be conducted under the auspices of Select Committees in Parliament. The 1921 Tribunals of Enquiry (Evidence) Act sought to remove the potential of political or partisan aspects from Public Inquiries, particularly as they were set up to address matters of controversial content. Blom-Cooper, "Public inquiries," p. 206

¹³⁶Sitze provides the example of the Durban Riots Commission (1949) which was legally a Commonwealth Commission and not a Royal Commission of Inquiry. When criticized that it afforded no right of counsel to witnesses and no right of cross-examination, the Commission clarified "British Royal Commissions of Inquiry provide a closer analogy to the present one than Tribunals of Inquiry (evidence) Act, 1921". Union of South Africa, *Report of the Commission on Enquiry in Riots in Durban*, 2 cited in Sitze, *The Impossible Machine*, 163 fn 23

“repeated a few of the more specific techniques and practices we see exemplified in the JRC”, creating a firm tradition of ‘Tumult Commissions’ in South Africa.¹³⁷ In this way, drawing upon the established modes of colonial Royal Commissions and Commonwealth Commissions of Inquiry, commissions such as the Wessels Commission were situated within a tradition of established colonial schemes used to manage resistance to colonial rule.

3.4 The Wessels Commission of Inquiry

3.4.1 Fact-Finding in the Wessels Commission

The Wessels Commission was in session from April 11th 1960 to June 16th 1960, meaning that it sat for a total of 43 days.¹³⁸ The objective of the Commission, as stipulated by its Terms of Reference, was “to investigate and report on the occurrences in the Districts Vereeniging (namely at Sharpeville Location and Evaton) and Vanderbijlpark, Province of the Transvaal, on 21 March 1960”.¹³⁹ Clearly, this mandate specifies the Commission’s core objective to be that of ‘fact-finding’ as distinct from ‘truth-seeking’. As will be detailed below, the Commission’s findings of ‘facts’ may be organised into two general types: objectively verifiable findings relating to specifics of what had transpired at Sharpeville on 21 March 1960; and findings relating to the mental and emotional dispositions of those involved in the incident.

¹³⁷Sitze, *The Impossible Machine*, p. 163. Sitze also documents some two dozen South African commissions set up to inquire into the “causes and circumstances of a given riot, disturbance or commotion”, p.160fn 8

¹³⁸One of the sessions (14th May) took place at the Baragwanath “Bantu” Hospital so that testimony could be taken from “certain patients”. Note that within the official report the individuals are referred to as “patients” and not as “victims” of the violence under investigation.

¹³⁹Republic of South Africa, *Report of the Commission Appointed to Investigate and Report on the Occurrences in the Districts of Vereeniging (Namely, at Sharpeville Location and Evaton) and Vanderbijl Park, Province of the Transvaal, on 21st March, 1960* (Pietermaritzburg: Government Relations Office, 1961)

Moreover, the Commission was “event specific” – it was mandated to inquire into the occurrences at a particular location on one specific day.¹⁴⁰ Generally, event-specific commissions of inquiry may be used to gather further information regarding a ‘tragedy’ such as the Sharpeville shootings to determine *whether the need exists* to launch legal proceedings of a formal, civil, criminal or disciplinary nature.¹⁴¹ As provided for by the Commissions of Inquiry Act of 1947, the Wessels Commission technically *did* have the lawful power to make findings pursuant to further criminal investigation, i.e. findings of legal responsibility, had this been considered as within the general purpose of the commission.¹⁴² Having developed out of the tradition of Commonwealth Commissions, the Wessels Commission borrowed some of the useful procedures and discretionary powers to fulfil its mandate that were characteristic of Commonwealth Commissions, including powers of search and seizure, summons and subpoena powers. Wessels affirmed the immense discretionary powers these types of Commissions have by claiming at the start that all proceedings would be entirely decided by him.¹⁴³ However, according to his interpretation of the Terms of Reference, the Commission would not apportion legal culpability nor “report on the liability of persons for their acts and omissions” as, according to its understanding, this was considered “outside the scope” of instruction.¹⁴⁴ Furthermore, neither of the main parties involved, i.e. members of the PAC or the SAPS,

¹⁴⁰Freeman, *Truth Commissions and Procedural Fairness*, p. 53

¹⁴¹*Ibid*, p. 54

¹⁴²The Act made provision “for conferring certain powers on commissions appointed by the Governor General for investigating matters of public concern, and to provide for matters incidental thereto”, where he could make regulations “providing generally for all matters which he considers it necessary or expedient to prescribe for the purposes of the investigation”, Commissions Act 8 of 1947

¹⁴³Republic of South Africa. *Report of the Commission Appointed to Investigate and Report on the Occurrences in the Districts of Vereeniging (Namely, at Sharpeville Location and Evaton) and Vanderbijlpark, Province of the Transvaal, on 21st March, 1960*. Pietermaritzburg: Government Relations Office, 1961 (Hereafter, The Wessels Commission), p.

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¹⁴⁴The Wessels Commission Report, p. 3

was represented by legal counsel, whilst the other interested parties were represented by legal practitioners.¹⁴⁵ Tellingly, the Wessels Commission report begins with a confident claim to its objective fact-finding charge, “After due consideration *I decided* that the task which Your Excellency assigned to the Commission was this, namely, to collect evidence in connection with the occurrences concerned and in the light thereof to report on my *findings of fact*”.¹⁴⁶ Furthermore, Wessels indicated from the outset that the Commission was not a court of law, but that nonetheless, investigative proceedings would be guided by “certain considerations of reasonableness”.¹⁴⁷ This may be taken as an instance of Ashforth’s ‘legitimizing schemes’: the appearance of following legal procedure and rules had the effect of authenticating the Commission’s findings as ‘objective facts’.

The Wessels Commission retained essential features of the Commonwealth Commissions model – it was held in public, it had powers of subpoena and its proceedings resembled that of a criminal trial.¹⁴⁸ This is relevant to the performative significance of the commission. As Katherine Leader commented on the spectacle of the criminal trial, the “performance [of the trial] is central to the trial process” as the spectacle of the adversarial criminal trial “involves a *performance of tradition* that positions the trial itself in society as a bulwark of justice, antiquity and authority.”¹⁴⁹ Leader’s use of the efficacy of ‘performance’ in the criminal trial may be compared with Ashforth’s notion of official Commissions as a ‘theatre of power’ in which the central ‘truths’ of official discourse are ritually enacted. The Wessels Commission indeed appeared to perform a semblance of

¹⁴⁵Ibid, p. 3-5

¹⁴⁶Ibid, p. 2

¹⁴⁷Ibid, p. 3

¹⁴⁸ Section 4 of the 1947 Commissions Act provided that Commissions of Inquiry shall be held in public

¹⁴⁹Leader, “Bound and Gagged: The Performance of Tradition in the Adversarial Criminal Jury Trial,” *Philament*, No. 11 (2007), p. 1

‘justice’ in action, whilst simultaneously admitting to its impotence to make findings on the criminal liability of state agents.

The issue at stake is the political function of an official commission of inquiry, or ‘tumult commission’, in the context of Apartheid’s highly legalistic, but illiberal democracy. Wessels frequently emphasized the limitations on the ‘findings of fact’ the Commission could make. He stated that it was not within the scope of the Commission to make recommendations;¹⁵⁰ and it also would not determine whether any of the police actions indicated that they were “guilty of any neglect of duty or contravention of any provision of the law”.¹⁵¹ This, however, meant that the Commission could not take its findings of ‘facts’ to their logical conclusion, as criminal prosecutions would have done, as it did not have the power to make findings of legal standing. When compared to the colonial JRC, these selective findings of ‘fact’ may be viewed as a continuation of colonial practices within Apartheid South Africa. It also confirms Sitze’s assertion concerning the ‘fact-finding’ role of ‘Tumult Commissions’ in South Africa, that whilst their mandates stipulated broad objectives of ‘fact-finding’, ‘Tumult Commissions’ ultimately gathered evidence relating to the “necessity of the use of police and military force in suppressing the riots and rebellions”.¹⁵²

To carry out its ‘fact-finding’ mandate, the Wessels Commission attempted to make forensic-like findings of ‘fact’ regarding objectively verifiable items such as the size of the

¹⁵⁰ “...It is not the task of the commission to make any special recommendations or to advise any action against or in connection with any person or group.”... but “simply and solely to inform Your Excellency on the occurrences to which the terms of reference refer”. Proceedings, The Wessels Commission Report, p. 3

¹⁵¹ The Wessels Commission Report, p. 197

¹⁵² Sitze, *The Impossible Machine*, p. 163

crowd of protestors,¹⁵³ the actions of the protestors and ballistic specifications, such as the particulars regarding who gave orders to shoot, and the duration of the shooting.¹⁵⁴ On the other hand, it also made ‘factual’ findings relating to the disposition of the crowd determined by cross-examination. Indeed, the Commission report devoted considerable attention to discerning the ‘mood’ of the protestors, and the police’s interpretation thereof. The local Sharpeville residents were presented in dichotomous terms, either as the hapless individuals whose actions were guided by irrational passions, or as accidental victims of the state’s violence. Mr Labuschagne testified on his observations of the protest march: “I climbed on the lorry and they were one black mass from the school to the hall.”¹⁵⁵ Testimony from a Lieutenant Visser similarly presented the protestors as a volatile, unthinking mob: “It was clear that the crowd was working themselves up to something. Whether they were themselves aware of what they were working themselves up to, I do not know. But it was clear they were becoming more and more unruly and out of control.”¹⁵⁶ Similar to the attitude shown towards the ‘native’ testifiers at the JRC, the mental soundness of the African witnesses testifying to the Sharpeville shootings was often called into question, undermining the credibility and reliability of their testimony. Typically it was observed that “from the previous night a large number of the demonstrators were probably involved in incidents which must have *affected their emotional state*”.¹⁵⁷

¹⁵³ The size of the protestors was an object of contestation, with some witnesses such as Major Van Zyl stating that the numbers were between 8000 and 10 000., Captain Cawood estimating 5000-7000 and Labusachagne saying that there were 5000, The Wessels Commission Report, p. 52, 65, 101

¹⁵⁴ See The Wessels Commission Report Chapters 5 and 6, ‘Occurrences in the District of Vereeniging’.

¹⁵⁵ The Wessels Commission Report, Ch 6 p. 74

¹⁵⁶ Wessels Commission Report, p. 105

¹⁵⁷ The Wessels Commission Report, p. 132

As we have seen, Sitze attributed the “curiosity” in the protestors’ “feelings”, “passions”, or “state of mind”, characteristic of ‘Tumult Commissions’, to a particular ‘colonial condition’ concerned with avoiding war.¹⁵⁸ He described this *therapeutic discourse*, concerned with questions of the psyche, or soul, of the protestors, as an attempt to understand and hence manage the conflict.¹⁵⁹ He concluded that “all tumult commissions needed to function as reconciliation commissions”.¹⁶⁰ The Wessels Commission report was also concerned to make ‘factual’ findings concerning the states of mind of the police involved in the shootings:

“I have already mentioned that the men who fired held out in their evidence that they were at that moment of opinion that their lives were in danger. *Whether such a state of mind existed is, of course, a question of fact.* Although some of the police witnesses did not impress me, I think it can be accepted that this state of mind was probably present in the men who fired”.¹⁶¹

As a legitimating scheme, therapeutic discourse is distinct from the discourse of objectivity. The technique effectively removed guilt from the shooters by affirming that they were justified in feeling threatened and hence, were essentially not guilty in intention or act.

3.4.2 ‘Truth-Seeking’ and ‘Truth-Telling’ After Sharpeville.

The Wessels Commission made no special claims to ‘truth-seeking’ or ‘truth-telling’ in the way that a ‘truth commission’ might. It did, however, make findings of fact on the particulars of the event under investigation in the same way that a court of law would.

¹⁵⁸ Sitze, *The Impossible Machine*, p. 167

¹⁵⁹ Ibid.

¹⁶⁰ Ibid, p. 169-170

¹⁶¹ The Wessels Commission Report, p. 197

Like the JRC in Jamaica, the proceedings of the Wessels Commission drew on those of Royal Commissions and Commonwealth Commissions by taking the form of an adversarial trial. Therefore, witnesses were sworn in prior to giving testimony and any person found to have given “false evidence before [the] commission... knowing such evidence to be false or not believing it to be true” would be guilty of an offence and liable on conviction to the prescribed sentence.¹⁶² Hence the ‘truth-telling’ function of the Commission was strictly linked to attaining ‘truth as factual knowledge’.

Moreover, to meet its objectives of ‘fact-finding’, it was neither necessary nor common practise that the Commission be ‘victim-centred’. This applied to ‘Tumult Commissions’ generally. Although Sitze asserted that the JRC “sought to give voice to the suffering of the natives”¹⁶³ there is no evidence to suggest that such ‘testimony’ was treated any differently from that which would be considered either relevant or irrelevant to a particular civil case in a court of law. If anything (as Sitze himself cites from the JRC’s account of the testimony of the ‘natives’, or what would today be referred to as the ‘victims’ of the massacre), the value of the testimony was considered in terms of its relevance to the aims of the commission, which was strictly that of ‘fact-finding’, and not of ‘truth-telling’ or with the aims of restoration. It is useful to quote an extract from the JRC’s report to illustrate this point.

“In many cases the witnesses manifested a singular ignorance of the nature and value of evidence, as well as a misconception of the proper scope of the Inquiry.

As regards the negroes, it is enough to recall the fact that they were for the most part uneducated peasants, speaking in accents strange to the ear, often in a

¹⁶² Section 6(2) of the Commissions Act

¹⁶³ Sitze, *The Impossible Machine*, p. 141

phraseology of their own, with vague conceptions of number and time, unaccustomed to definiteness or accuracy of speech, and, in many cases, still smarting under a sense of injuries sustained.

Many of them, again, misconceived the object of the commission, and *came to tell their tale* of houses burnt or property lost, *in the undisguised hope of obtaining compensation*...Even as regards the other witnesses, many even of the educated class could often scarcely be restrained from giving opinions in general and positive terms as equivalent to facts, or from stating as facts within their own knowledge matter communicated to them by others.

A considerable body of evidence, especially in relation to the state of the Island, was thus tendered, which, on being sifted by us, proved of but little value.”¹⁶⁴

Nonetheless the JRC maintained, despite having acquired “redundant” evidence, that it was satisfied that the Inquiry “has been both thorough in fact, and thorough likewise in the estimation of the persons most concerned”.¹⁶⁵

The extract indicates that the colonial ‘Tumult Commission’ was not intended as a space in which ‘victims’ could ‘tell their tale’ of their experience of abuse, i.e. of their houses burnt or their property lost.¹⁶⁶ They were supposed merely to be vessels of information from which to extract relevant knowledge to the Commission. Similarly, after cross-

¹⁶⁴ Report of the Jamaica Royal Commission, Part 1, 8 [Emphasis Mine]

¹⁶⁵The Jamaica Royal Commission, Section 1, p. 8

¹⁶⁶The Commission had some funds at its disposal to pay those who had travelled to Spanish Town to give evidence before the Commission and it appears that some victims were hopeful that they would receive some form of compensation, or ‘reparative justice’, for their material possessions that were vandalised by the British Security forces in the suppression of the Morant Bay uprising. However, Royal Commissions, and Commissions of Inquiry generally, do not serve purposes of allotting compensation, or reparations. Instead, and as was also provided by the Commissions Act of 1947, official commissions will have a certain amount of funds with which they may pay out ‘witness fees’ much in the same way as a witness may receive payment for testifying at a criminal trial: “Any person who has been summoned to attend any sitting of a commission as a witness or who has given evidence before a commission shall be entitled to the same witness fees from public funds, as if he had been summoned to attend or had given evidence at a criminal trial in a superior court held at the place of such a sitting, and in connection with the giving of evidence or the production of any book or document before a commission, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book or document in such a court, shall apply”, The Commissions Act. 3(4)

examination by expert lawyers Wessels stated “The Bantu Witnesses were... rather unreliable as far as reckoning time is concerned and it is therefore, possible that they did not hear the rumour as early as they made out.”¹⁶⁷ In both the Colonial JRC and Apartheid-era Wessels Commission, the overall reliability of ‘native’ testimony was questioned when it did not conform to the strict legal codes of admissible evidence. These case examples substantiate Ashforth’s point that the authority of the Commission’s findings as ‘objective truths’ were established by the process of hearing testimony as would a court of law. However, neither of these Commissions were designed to acknowledge the individual, subjective experiences of those the state had harmed.

Related to the intersection of the processes of a court of law and a Commission of Inquiry is the use of cross-examination as a legal means by which ‘truth’ is verified. It was not the usual procedure of the Wessels Commission, as a fact-finding commission of inquiry, to make use of cross-examination. However, on occasion Judge Wessels alluded to its use as a means to attain ‘truth’. He stated,

“Where evidence is given under oath or after solemn affirmation, as was the case here, cross-examination is a recognized and sometimes effective method of testing the reliability thereof provided it is undertaken by a skilled person...The course of the proceedings proved again that effective cross-examination is sometimes *the only way to arrive at the truth*”.¹⁶⁸

From this, one may ascertain that part of the Wessels Commission’s ‘scheme of legitimation’ was that it operated within a ‘regime of truth’ analogous to a court of law. Like the JRC, the Wessels Commission was not a space for public truth-telling and the

¹⁶⁷This refers to a rumour that they would be addressed by an official by 2pm that day. The Wessels Commission Report, p. 107

¹⁶⁸The Wessels Commission, p. 8

cross-examination of witnesses ensured that there would be no 'extra-legal' truths under the gaze of the Commission.

Moreover, the legalistic 'criminal regime' that characterised Apartheid and which outlawed protest, public gatherings and political dissent of any form, including the very laws (Pass laws) that had precipitated the protests, remained far outside the 'regime of truth' within which the Wessels Commission operated. To use Audrey Chapman and Patrick Ball's distinction, the Wessels Commission did not inquire into the 'macro-truths', or long term structural causes of the violence, but focused on the 'micro-truths', limiting its inquiries to the night prior to the protest and the day of the shootings.¹⁶⁹ In neglecting the structural causes of the protest however – in wholly constraining the regime of truth to micro truths -- the Commission undermined the thrust of the legitimate grievances felt by the protestors and privileged the official version as presented by the Police.

The Commission Report was heavily one-sided. Sharpeville residents' testimony was referred to only occasionally, whilst it recapitulated the Police's evidence in great detail. Because of the fearful political climate under the state of emergency, in addition to existing laws that criminalised 'riotous assemblies', local residents could hardly speak freely in giving evidence and in many cases their testimony echoed that of the police - that

¹⁶⁹ For Chapman and Ball *macro truth* provides a framework to understand the *structural influences* of violence, and which may point to the broader causes or intellectual foundations of the conflict under study. Comparatively, *micro truth* refers to those particular circumstances and personnel that led to the committing of particular individual crimes. Chapman, Audrey and Patrick Ball. "Levels of Truth: Macro Truth and the TRC" in A Chapman and H Van der Merwe (Eds.) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* University of Pennsylvania Press, 2008.

they had no prior knowledge of the PAC's campaign and had joined the strike due to intimidation.¹⁷⁰ Hence, victim participation was, as best, constrained.

In his study of the Sharpeville massacre and its consequences, Tom Lodge observed that for two decades after the 1960 shootings there was no public discussion regarding the events at Sharpeville.¹⁷¹ One victim claimed that “we were forced to forget about the shootings, because if you spoke about them you were arrested”.¹⁷² Therefore, within this particular post-colonial, apartheid context the Wessels Commission could not reasonably make any claims to ‘truth-seeking’, nor was the Commission a space in which victims could speak truth to power. Indeed, the Wessels Commission concealed more than it revealed and, as Sitze concluded, it provided “little more than an empty legal husk that continued to repeat colonial truths under postcolonial conditions, conditions in which those truths openly appeared to be untruths”.¹⁷³

3.4.3 Narrative Function: ‘Whitewashing Machines’ finding ‘No one to Blame’

As the previous two sections demonstrated, the ‘fact-finding’ and ‘truth-seeking’ of the Wessels commission was strictly limited to the narrowly-defined legal facts surrounding the Sharpeville massacre. Unlike the ‘Native Question’ Commissions that used expert anthropologists and economists to provide the terms for speaking about the ‘native problem’ and offer expert ‘solutions’, the Wessels Commission did not use experts to validate its official findings. However, as was the case in ‘Native Question’ Commissions,

¹⁷⁰Tom Lodge, *Sharpeville: an apartheid massacre and its consequences*, p. 328 In addition, laws like the Criminal Law Amendment Act of 1953 stipulated that anyone who accompanied or supported a person found guilty of offences during a protest would also be presumed guilty, and the onus would be on them to prove their innocence.

¹⁷¹Ibid, p. 329

¹⁷²Jasper Van der Bliek (Ed). *Sharpeville Scars*, p. 42

¹⁷³ Sitze, *The Impossible Machine*, p.187

the selective facts posited as the ‘official truth’ concerning the mass killings contributed to the overall official narrative that the Commission facilitated: that the police had acted in the belief that their lives were in danger and to prevent further violence and disorder by the African anti-Pass demonstrators. Laws like the Public Safety Act provided the legal context in which officers acting in the interest of ‘public safety’ were not held liable for their actions, and those who gathered in protest were presumed as guilty under the Riotous Assemblies Act. With these laws in place, the discursive role of the Commission consisted in seeking to persuade the public and international community that the police had acted reasonably.

As Hayden White argued, narratives involve particular ontological and epistemic choices with regard to how a story is recounted, while these choices have distinct ideological and political consequences.¹⁷⁴ In this case the way in which Wessels interpreted the mandate of the Commission predetermined the findings and the version of the facts that was authorized as the ‘true’ version of the event. Wessels stated at the outset that the Commission would not report on the liability of persons; in consequence the Commission’s narrative found that no one was indeed liable. To use Sitze’s terminology, the language of “concomitant causes” encompassed the *tragic discourse* of official exoneration, concluding that no one was to blame.

The concluding pages of the report affirmed that the ‘trend of evidence’ provided by the police confirmed that they believed that their lives were in danger, which justified their shooting. This is despite the evidence that many of the protestors were shot in the back

¹⁷⁴ White, *The Content of the Form*, p. ix

fleeing the scene, or the photographic evidence contradicting police testimony.¹⁷⁵ The prevailing discourse depicted the protestors as violent and unruly, while Wessels maintained that "there could not be the slightest doubt" that the PAC protest was preceded by a night of "violence and threats of violence", which had contributed to the feelings of distrust and fear among the police officers. Submissions by the police painted the crowd as 'armed', 'rebellious' and 'noisy', stating that a 'bloodbath was inevitable', despite the fact that the protestors were at best armed with knobkerries and stones.¹⁷⁶ The language and discourse is heavily imbued with the racist rhetoric of the '*swart gevaar*', or 'black peril', derived from colonial discourses of 'barbaric' African customs. Colonel Pienaar added, "The native mentality does not allow them to gather for a peaceful demonstration. For them, to gather means violence".¹⁷⁷ These discursive schemes worked in tandem with the legalistic charade of the Commission to justify the police response to the PAC demonstration as well as to provide a dramatic narrative of the Sharpeville massacre, and the terms in which it could be legitimately spoken of. The 'truth' of the massacre was reduced to discerning whether the level of force used was justified. To accomplish this verdict, considerable attention was given to the facts surrounding an alleged 'attack' on the police fence by one of the protestors, which had driven one of the

¹⁷⁵For instance, police denied carrying *sjamboks* when photographs taken at the time refuted this. Moreover, police accounts denied having fired shots from the vantage points of their armoured vehicles and claimed that shooting was done by men on the ground, where visibility was not good and where their cues were taken from the 'mood' of the people directly in front of them – photographs by Ian Berry reveal this to be untrue. Judge Wessels also did not inquire into why it was that police continued to fire shots after protestors had turned to flee, nor did he explore why some police reloaded weapons and continued shooting. See Frankel, Philip. *An ordinary atrocity: Sharpeville and its massacre* (Yale University Press, 2001)

¹⁷⁶ The general trend of police submission to the commission is apparent from pages 121-131 of the Wessels Commission Report.

¹⁷⁷Richard Reeves, *Shooting at Sharpeville: the agony of South Africa*. (Houghton Mifflin, 1961), p. 77

police to fire the first shot.¹⁷⁸ However, the conclusion reached was not only evasive, but neglected a range of factual evidence in order to authorize an official verdict that supported the narrative sanctioning the state killings. As Wessels stated in his concluding remarks,

“After linking all the evidence and probabilities I have come to the conclusion that I can find neither that there was an attack at the gate nor that there was in fact no attack. Be that as it may, the first shots by police had a decisive effect on events. It would serve *no useful purpose* to consider how matters would have developed if no shots had been fired at that moment. Possibly there would have been no loss of life. It is also possible that there would have been a worse bloodbath.”¹⁷⁹

It is clear that the Wessels Commission was one which spoke the ‘truth’ of what was useful to the State’s objectives. It is for this reason that the Wessels Commission could refer to the Sharpeville massacre as “less a crime than a regrettable and lamentable tragedy”.¹⁸⁰

3.5 Conclusion

This chapter situated the Wessels Commission within the chronology of Royal and Commonwealth Commissions of Inquiry, and more specifically of ‘Tumult Commissions’. In line with the Commonwealth Commission tradition, the Wessels Commission followed ‘impartial’ and quasi-legal procedures to define the object of its inquiry. A more specific analysis of the legitimating functions of the Wessels Commission as an Apartheid ‘tumult commission’, showed that it functioned to justify the actions of the police, both to domestic and international stakeholders and abroad. It did this by framing its findings

¹⁷⁸ The logic was that had an attack occurred at the gate, the police may have been justified in feeling threatened, which could be interpreted as warranting the firing of their guns.

¹⁷⁹ The Wessels Commission, p. 183

¹⁸⁰ Cited in Bishop, “An Accidental Good,” NPG

within the grand narrative of the security forces having acted in the interest of protecting the social order. Hence, the ‘legitimizing schemes’ of the Wessels Commission were identified in terms of three distinct but related mechanisms. First, the *official* status of the commission as a state-sanctioned institution permitting the commission report’s representation of the Sharpeville massacre as ‘the truth’, posited as an ‘official history’. Second, the appropriation of specific procedures and functions of the legal tradition, e.g. the use of cross-examination of witnesses; and third, the discursive strategies of the ‘tragic’ narrative that functioned as a mechanism that exonerated the police, while at the same time, admitting the ‘facts’ of the massacre.

Compared to the way in which ‘Native Question’ Commissions utilized expert economist and anthropologist testimony to provide reasonable knowledge on the development of native homelands, the Wessels Commission did not rely on this particular type of ‘expert’ or ‘intellectual’ validation as a legitimization scheme. Rather, it relied on formalised, strict procedures mimicking that of a criminal trial that fed into the authentication of the findings as ‘objective facts’. In many ways this legalistic discourse was symptomatic of the ‘legal-fetishism’ of Apartheid’s ‘criminal regime’, blurring the lines between legality and criminality.

Finally, in opting to inquire solely into the immediate facts surrounding the massacre and ignoring the ‘macro-truths’ and structural, economic conditions that spurred the protestors grievances the Commission was implicated in the very problem it sought to solve instead of proposing a ‘solution’ to the ‘problem’. Characterising the nature of Apartheid’s repression as a post-colonial ‘criminal regime’ paints a picture where the lines between politics and criminality became wholly blurred, and where legitimate and

illegitimate agency resided within contesting “regimes of truth”. As the Comaroffs argued in *Law and Disorder in the Postcolony*, in many post-colonial contexts the line between legitimate and illegitimate agency is “a frontier in the struggle to assert sovereignty or to disrupt it, to expand or contract the limits of the il/licit, to sanction or outlaw violence”.¹⁸¹ Indeed, the Commission of Inquiry was a tool by which predatory apartheid police were officially exonerated from criminal guilt, and where those involved in the uprising were narrated as villains. However, like the JRC, the ‘truth’ of the Wessels commission functioned to legitimate injustice and impunity, which effectively undermined the ‘objectivity’ of the commission’s findings.

The Sharpeville Massacre marked the beginning of the liberation forces’ armed struggle against Apartheid. The date of the Sharpeville Massacre also marks the date from which the mandate of South Africa’s Truth and Reconciliation Commission, demarcated the time frame of its investigation into gross human rights violations. As stated in Chapter One, the TRC is widely acknowledged as a truth commission and instrument of transitional justice designed to ease South Africa’s transition from Apartheid to democracy. However, as I argued in Chapter 2 following Freeman, truth commissions form a sub-type within the conceptual umbrella of commissions of inquiry. The following Chapter discusses the implications of this on the TRC’s ‘truth-seeking’ and the extent to which it remained faithful to the ‘Tumult Commission’ tradition in South Africa.

¹⁸¹ Comaroff, J. and Comaroff, J.L. (eds) *Law and Disorder in the Postcolony* (University of Chicago Press, 2008), p. 11

Chapter 4: ‘Truth’ and the ‘official discourse’ of the Truth and Reconciliation Commission.

4.1. Introduction.

Scholarship on the TRC has given little attention to its relation to Royal and Commonwealth Commissions of Inquiry, specifically those with mandates of ‘fact-finding’ into incidents of state-sponsored violence. Unlike the JRC and the Wessels Commission, the TRC was not ‘event-specific’.¹⁸² It was tasked to inquire into the vast array of human rights abuses committed in apartheid South Africa between 1 March 1960 and the cut-off date.¹⁸³ It was designed as “part of the bridge-building process” to guide South Africa’s transition to democracy; it also sought to signify a definitive departure from Apartheid’s ‘criminal regime’ and restore public confidence in the new democracy.¹⁸⁴ Hence, it has conventionally been studied within the hermeneutical field of transitional justice.

¹⁸²As Freeman argues, truth commissions form another type of commission of inquiry apart from event-specific, thematic, socio-historical and institutional commissions of inquiry. See Freeman, *Truth Commissions and Procedural Fairness*, p. 53-58

¹⁸³ The mandate stipulated that the Commission should establish “as complete a picture as possible of the causes, nature and extent of the *gross violations of human rights* which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the *perspectives of the victims* and the *motives and perspectives of the persons responsible* for the commission of the violations, by conducting investigations and holding hearings”. It should also facilitate the “granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act”; establish and publicise the fate or whereabouts of victims and restore the human and civil dignity of such victims “by granting them an opportunity to relate their own accounts of the violations of which they are the victims”, as well as make recommendations for reparation measures in respect of its findings. *TRC Report* Vol 1, Ch 4, Section 31 (a)

¹⁸⁴ The report further states that the TRC’s purpose should be understood as one part in and among a number of mechanisms to promote democracy, i.e. the Land Claims Court, the Constitutional Court and the Human Rights, Gender and Youth Commissions. Together, these institutions were intended to assist in the “transformation of South African society.” *TRC Report* Vol 1, Ch 4, Section 2

Truth commissions and ‘truth-seeking’ processes are usually compared with and differentiated from other modes of transitional justice, namely criminal trials, collective amnesia or lustration.¹⁸⁵ The transitional justice literature, for example key texts by Kritz, Rotberg and Thompson, and Minow raise various kinds of issues --some moral, legal and political -- pertaining to how societies come to terms with their conflict-ridden past and move towards a more just, reconciled and democratic polity.¹⁸⁶ The comparative literature on transitional justice commonly tends to frame truth commissions within the ‘truth versus justice’ debate, or the relative priority given to the interests of different sets of actors, e.g. “perpetrators, victims, beneficiaries, collaborators, bystanders or others”.¹⁸⁷ Depending on the nature of the regime, different “moral needs” arise. States must ask themselves what need is greater, in order to help society move on - justice, accountability and retribution on the one hand [i.e. bringing perpetrators to justice]; or restoring human and civic dignity to victims [i.e through ‘truth-seeking’, ‘truth-telling’ and reconciliation or processes of redistribution]; or which particular groups unduly benefitted from the oppression of another group.¹⁸⁸

¹⁸⁵ Lustration refers to the systematic vetting of government officials associated with the Communist regimes in Central and Eastern Europe and purging them from public positions. In Czechoslovakia and Bulgaria lustration laws were passed that barred those associated with the former regime from state positions, or from academic posts, respectively. In East Germany information was divulged from their personal files. In a sense, this constitutes a kind of ‘truth-finding’ process as official information concerning state collaborators were made public. See Rosenberg, “Overcoming the legacies of dictatorship.” p. 134-152. Lustration may also be linked to Jon Elster’s notion of ‘administrative justice’ – “purges in the public administration” *Closing the books: Transitional justice in historical perspective* (Cambridge University Press, 2004) p. 92

¹⁸⁶ Kritz, *Transitional justice: how emerging democracies reckon with former regimes* (Vol. 1); Martha Minow, “Between vengeance and forgiveness: South Africa’s truth and reconciliation commission,” *Negotiation Journal*, Vol. 14, No. 4 (1998) p. 319-355; Andrew Rigby, *Justice and reconciliation: After the violence* (Lynne Rienner Publishers, 2001); Rotberg, R.I. and Thompson, D. eds., *Truth v. justice: The morality of truth commissions* (Princeton University Press, 2010)

¹⁸⁷ Rotberg and Thompson, *Truth v Justice*, p. 127;

¹⁸⁸ Ibid. Moreover, studies by Borer, Hayner and Olsen et al have assessed truth commissions’ ability to achieve their stated aims of social healing, reconciliation, ‘peace-building’, or the extent to which they can improve human rights in a post-conflict society. Olsen et al assert that on their own, truth commissions “tend to emphasize either

Dr Alex Boraine who was both one of the TRC's key masterminds,¹⁸⁹ as well as its deputy Chairperson, described the TRC as a "third way" in the field of transitional justice, combining the 'truth-seeking' of the Latin American truth commission model with the retributive threat of criminal prosecutions in its novel conditional amnesty setup.¹⁹⁰ However, as was argued in section 2.3 above, the TRC actually shared many characteristic features with 'Tumult Commissions' (Royal Commissions or Commonwealth Commissions of inquiry). These were used by the British colonial government and subsequently also by the Apartheid regime specifically to legitimate *injustice* and *untruths*. As Sitze asks, "what does it mean that one can find so many of the defining attributes of the TRC operating under conditions defined not by democratic transition but by colonial and even Apartheid governments?"¹⁹¹ When viewed genealogically, was the TRC a 'break' with the former regime, or rather an attempt to use the "master's tools" to "dismantle the master's house?"¹⁹² How was the TRC's 'truth-seeking' role different to the 'Grand Tradition' commissions of inquiry that told the "truth of state"? Can one not compare the TRC's use of amnesty with the class indemnities of martial law, or with Apartheid's indemnity laws that prevented state agents from being held accountable for politically motivated violence? With political violence being the object of inquiry, the

accountability or impunity", but that truth commissions can assist in improving human rights by "fortifying the balance" between accountability and impunity", p. 469 (Olsen, T.D., Payne, L.A., Reiter, A.G. and Wiebelhaus-Brahm, E., 2010. "When truth commissions improve human rights". *International Journal of Transitional Justice*, 4(3), pp.457-476). See also Borer, T.A., 2006. *Telling the truths: Truth telling and peace building in post-conflict societies*. Univ of Notre Dame Pr.

¹⁸⁹ For a detailed insider account of Boraine's personal involvement in initiating the idea of a TRC in South Africa see Boraine, *A Country Unmasked*, Cape Town and Oxford, 2001.

¹⁹⁰ Alex Boraine. "Truth and Reconciliation in South Africa: The Third Way." In *Truth v. Justice: The Morality of Truth Commissions*, R Rotberg and D Thompson (Eds), (Princeton University Press, 2000), p. 141-57

¹⁹¹ Sitze, *The Impossible Machine*, p. 191

¹⁹² Audre Lorde, "The Masters Tools will never dismantle the Master's House", Lorde 1 [Online] http://collectiveliberation.org/wp-content/uploads/2013/01/Lorde_The_Masters_Tools.pdf

question remains: to what extent could the TRC be considered as yet another ‘Tumult Commission’ that whitewashed state massacres via discursive strategies that promoted ‘truth’, reconciliation and healing?¹⁹³ These questions are abstract, and require critical interrogation to understand the legacy left by the TRC and its impact on post-Apartheid South Africa’s Marikana Commission of Inquiry. As noted by transitional justice expert Neil Kritz, one of the main challenges of truth and accountability faced by transitional societies is how “to strike the proper balance between a *whitewash* [of past political violence] on the one hand and a witch hunt on the other”.¹⁹⁴

This chapter takes a critical approach to the TRC viewed within the context and chronology of commissions of inquiry using the conceptual distinction of ‘fact-finding’, ‘truth-seeking’ and the pragmatic functions of official discourse and practice developed in Chapter Two. Through a critical consideration of the TRC’s relation to civil society, it builds on the differentiated notion of “truth-telling” using the analytical distinction of speaking truth *with* and *to* power, as well as that between ‘truth as knowledge’ and ‘truth as acknowledgment’. The aim is not to provide a comprehensive account of all aspects, or to evaluate the ‘success’ of the TRC as a transitional justice tool, but to raise some significant issues that standard accounts of transitional justice, with a narrow focus on perpetrators and victims of past human rights violations, tend to miss.

¹⁹³ See Annelies Verdoolaege, *Reconciliation discourse: The case of the Truth and Reconciliation Commission* (John Benjamins Publishing, 2008)

¹⁹⁴ Kritz, *Transitional justice*, x [emphasis mine]

4.2 The TRC's Inception: A Public Call for 'Truth'

Chapters Two and Three explained that commissions of inquiry use public settings and processes to authorise official discourse on a period of state violence. Ashforth specifically highlighted the legitimating function of colonial and post-colonial commissions of inquiry, emphasizing the 'schemes of legitimation' involved in the symbolic ritual of the commission's proceedings.¹⁹⁵ He also noted that commissions of inquiry are state-led initiatives set up in response to a 'crisis' for which it seeks a 'solution'. However the TRC was set up by a different kind of process to any other official commission of inquiry in South Africa. Whilst its origins are usually located in the elite-led constitutional negotiations, the desire for an official truth project was not shared by political elites and actually came from civil society.¹⁹⁶ This detail placed the TRC in a complex position in relation to the state on the one hand and civil society on the other.

4.2.1 The Preamble to the Interim Constitution: "There Shall Be Amnesty"

The TRC's immediate political context was a *negotiated settlement* reflected in South Africa's Interim Constitution.¹⁹⁷ This settlement precluded the possibility of criminal prosecutions modelled on the retributive-style transitional justice of Nuremburg, but

¹⁹⁵ Ashforth, "Reckoning Schemes of Legitimation", 6

¹⁹⁶ The relationship between the TRC and the newly elected ANC government was not stable. In his personal memoir, Alex Boraine reflected on the favourable conditions within which the TRC operated - one of which was the "strong support" the TRC received from the Government under the "powerful leadership" of President Nelson Mandela. As the TRC process progressed, however, it faced increasing opposition from multiple groups including the ANC. Alex Boraine, *A Life in Transition*, p. 199

¹⁹⁷ 'Transitologists' agree that the type of transition that a former authoritarian state undergoes will impact on the nature of the transitional justice mechanism that is adopted by the newly democratic state and reflects the balance of power between political groups. See Huntington, S.P., 1993. *The third wave: Democratization in the late twentieth century* (Vol. 4). University of Oklahoma Press; Karl, T.L. and Schmitter, P.C. 1991. "Modes of transition in Latin America, southern and eastern Europe". *International Social Science Journal*, 128(2), pp.267-282. For Chapman and Ball, truth commissions typically emerge out of negotiated settlements, where no political entity holds the monopoly of power. Chapman and Ball, "Levels of Truth: Macro Truth and the TRC", in: A Chapman and H Van der Merwe (Eds.) *Truth and Reconciliation in South Africa: Did the TRC Deliver?* University of Pennsylvania Press, 2008.

rather contained an “*implicit and explicit pact on the need for amnesty*.”¹⁹⁸ In analysing the ‘truth-seeking’ function of the TRC it is necessary to situate this in the context of the protracted struggle against the Apartheid regime, which had in effect led to a military stalemate and prompted elite-led negotiations. As Minister of Justice Dullah Omar stated at the time,

“if we did not agree to the ‘postamble’, which made provision for amnesty, there would have been no negotiated settlement in our country. The government of the day and the National Party, in particular, would not have agreed to democratic elections and the introduction of this democratic constitution without making provision for amnesty...[The] idea was ultimately accepted, that a perpetrator cannot excuse himself or herself for a crime committed and that only under a democratic dispensation can the question of amnesty be handled... You must locate the question of amnesty within the context of total settlement in our country. If you discuss it separately, you get a false picture of reality and the choices which faced our country.”¹⁹⁹

Clearly, an amnesty agreement was the *sine qua non* of the negotiated settlement. This suggests that both sides of the ‘elite’ pact-makers agreed on amnesty as a prerequisite for settlement and hence of the ‘peaceful’ transition. Significantly, though, this agreement did *not* include provision for a truth commission. Indeed, the amnesty provision in the ‘postamble’ contains no specific requirement for the disclosure of ‘truth’. As André du Toit has noted, the discourse that framed the Postamble included “seminal formulations on

¹⁹⁸ André du Toit. "Experiments with Truth and Justice in South Africa: Stockenström, Gandhi and the TRC." *Journal of Southern African Studies*. Vol 31, No. 2 (2005), p. 483. The original provisions are recorded in the postscript (or what also became known as the ‘Postamble’) to the Constitution of the Republic of South Africa Act No. 200 of 1993 (the *Interim Constitution*). The ‘Postamble’ stated that “In order to advance ... reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past”.

¹⁹⁹ Dullah Omar cited in Timothy Sizwe Phakathi and Hugo van der Merwe, “The Impact of the TRC’s Amnesty Process on Survivors of Human Rights Violations”, in: van der Merwe and Chapman, *Truth and Reconciliation in South Africa: Did the TRC deliver?* (University of Pennsylvania Press, 2008), p.117

‘peace’, ‘reconciliation’, ‘forgiveness’ and ‘ubuntu’ that were subsequently also incorporated into the Preamble of the Final Constitution and the TRC Act; however, crucially, there was no commensurate reference to the imperative of ‘truth’ in the official discourse that narrated the new South Africa nation into being.²⁰⁰

References to a ‘need for truth’ were rather articulated in public discourse and by human rights movements within civil society. In the early 1990s, increasing disclosures began to leak into the public sphere concerning covert crimes, including killings and acts of torture, committed by state functionaries in ‘death squads’ at the now infamous *Vlakplaas*. These became linked to unresolved cases of political assassinations and reports on the counter-insurgency tactics of the Civil Co-operation Bureau (CCB) carried out by SADF Special Intelligence. Moreover, soon after the unbanning of the major anti-Apartheid organisations – the ANC, PAC and the South African Communist Party (SACP) – a number of allegations arose concerning the ANC’s own violent disciplinary tactics within its training camps in Angola, Tanzania and other areas of Southern Africa in the early 1980s. Reports appeared of the use of necklace murders by ANC-aligned political forces among civilians in townships and events like the Boipatong Massacre.²⁰¹ These disclosures prompted widespread response by distinct civil society groups and individuals

²⁰⁰ Du Toit, “A Need for Truth”, p. 402; The Interim Constitution stated that “in order to advance... reconciliation and reconstruction, amnesty shall be granted in respect of Acts, omissions and offenses associated with political objectives, committed in the course of conflicts of the past”. Parliament was to decide the procedures on which amnesty would be granted. *Interim Constitution of the Republic of South Africa*

²⁰¹ Stories were leaked in a series of articles published in 1989 in an Afrikaans newspaper the *Vrye Weekblad* by journalist Jacques Pauw, and in *Rapport* by Piet Muller. Relevant to this is that Muller did not in fact support the idea of bringing the truths to the open sphere, but thought that, due to the level of atrocities on both sides of the conflict, it would be best to cover up the past and rather let South Africa move on with a clean slate. During this time two commissions of Inquiry were set up. Following the Boipatong Massacre the Report of the Commission of Enquiry into the incidents at Sebokeng, Boipatong, Lekoa, Sharpeville and Evaton on 26 March 1990 ‘To inquire and report upon all the factual circumstances concerning the incidents that took place on 26 March 1990 during which people were injured and killed.’ And the Harms Commission of Inquiry into “certain alleged murders” that investigated the claims made regarding the hit squads based at Vlakplaas. Du Toit “A Need for Truth”, pp. 397, 378, 408.

who began to express both the *need* for, and the *right* to, truth concerning past violence.²⁰² A general amnesty, as had been proposed by the elite political pacts would have erased all traces of past crimes from the official historical record, including the crimes committed by the Apartheid state agents, but also those of the liberation movements.

The ANC responded to the allegations by establishing its own set of internal ‘fact-finding’ inquiries to investigate the claims -- the *Stuart*, the *Skweyiya*, and the *Motsuenyane* Commissions of Inquiry.²⁰³ These commissions, the *Motsuenyane* Commission in particular, were relatively successful in their ‘truth-recovery’ process confirming that human rights abuses such as detention, torture and extra-judicial executions were carried out by the organisation in exile.²⁰⁴ However, importantly, these commissions were *unofficial* truth projects. Therefore - to invoke Nagel’s useful distinction - although they were able to uncover *knowledge* concerning abuses that occurred at the training camps, they did not achieve official and appropriate *acknowledgment* of those atrocities. Nonetheless, they had impact. The various internal reports of these Commissions resulted in major divisions at the ANC’s National Executive Council (NEC) meeting in August 1993.²⁰⁵ By way of a compromise aimed at resolving these internal divisions Kader Asmal

²⁰²As Brian Currin, wrote on behalf of Lawyers for Human Rights: ‘A blanket indemnity against prosecution is a denial of the right of South Africans to their history... We have the right to know the nameless and faceless torturers and assassins through whom an unjust system of government has been upheld for the last four decades’. ‘Forgiveness Belongs Not to Those who have Sinned’. *Weekly Mail* (14 August, 1992)

²⁰³Acknowledging these, the TRC report noted that it was the ANC that first proposed the idea of a truth commission-type investigative body as a mechanism to deal with legacies of human rights abuses. *TRC Report*, Vol.1, Ch 4, Section 7. This point is also made by former deputy chairperson of the TRC, Alex Boraine, *A Country Unmasked*, (Cape Town and Oxford, 2001) p. 11

²⁰⁴ For more on the ANC training camps see Stephen Ellis, "Mbokodo: Security in ANC Camps, 1961-1990," *African Affairs* (1994), p. 279-298, 279

²⁰⁵ Kader Asmal recounts these meetings in his personal memoir: “Drafts of the constitution would be passed on to the National Executive Committee where they would be thoroughly debated. Mandela would chair these meetings and he was very meticulous about noting who voted for what position ... Debates would get very heated. I recall it

proposed the need for a *national* Truth Commission, “or Commission of Inquiry” to investigate human rights abuses committed on both sides of the conflict.²⁰⁶ He outlined the ‘benefits’ of a truth commission in the South African context as follows:

“The most important reason for the establishment of such a commission is to *get to the truth*. The experience of Chile, Argentina and El Salvador keenly reflects the *cleaning power* of the truth. Thousands of people who gave evidence rarely, if ever, showed a desire for vengeance. What mattered most was that the memory of their loved ones would not be denigrated or forgotten and that such terrible things would never happen again.”²⁰⁷

However, apart from individuals like Asmal, Albie Sachs and a few other human rights activists there was *no* sustained ANC support for the truth commission proposal. Others advocated that because of the level of atrocity committed on both sides of the conflict it would be in the interest of all to apply a general amnesty and put the past to rest.

From a human rights perspective, a general amnesty is problematic as it provides unqualified immunities to the perpetrators of gross human rights abuses.²⁰⁸ This would have rendered any possibility of holding perpetrators accountable void. As an additional

was at one of those NEC meetings that the issue came up of the moral accountability of those responsible for the crime of apartheid. We were struggling at the time with our own reports of transgressions on our side in the ANC camps, and whether those could be compared to the daily injustice of Apartheid, not to mention the violence with which it had been imposed. It was then that I proposed the idea of a truth commission.” Asmal also tells of Sachs' proposal for a government of national unity and reconciliation and his, Asmal's, own suggestion to embrace a "programme of reconstruction and development" that later became ANC's government's Reconstruction and Development Plan. *Politics in my Blood*, (Auckland Park, Jacana Media: 2011) p.120

²⁰⁶ Boraine, *A Country Unmasked*, p. 11-12

²⁰⁷ Asmal, K., 1993. “After Motsuenyane”, *Mayibuye* October 1993, p.14 [emphasis mine] Note the way in which Adv. Budlender's account of the aims of the Farlam Commission are similar to those of the TRC that Asmal outlined.

²⁰⁸ See Ronald Slye. “Amnesty, truth, and reconciliation: Reflections on the South African amnesty process”, in Rotberg and Thompson, eds., *Truth v. justice: The morality of truth commissions* (Princeton University Press, 2010)p.170-88.

effect, blanket amnesty would have closed the books on the possibility of ‘truth’ regarding human rights violations committed during Apartheid.²⁰⁹

A series of workshops and conferences hosted by IDASA made a significant contribution to the conceptualisation of the TRC and lobbying for the drafting of the Promotion of National Unity and Reconciliation (PNUR) Act (No. 34 of 1995).²¹⁰ The draft legislation of the PNUR Act was based on approximately 150 hours of public hearings in January 1995 where numerous civil society groups, NGOs and religious, mental health and human rights groups made representations.²¹¹ It was during this period that the two (conflicting) objectives of amnesty, and a public truth process were fused in the idea of “conditional amnesty”, or the truth-for-amnesty compromise.²¹² This challenges the assumption that the TRC’s inception was directly linked to the ‘Postamble’. The earliest draft legislation by the Department of Justice in 1994 was for an Amnesty Commission, and not a Truth Commission. It seems that ‘truth’ was not a priority for the political elites that negotiated the architecture of South Africa’s new democracy. Had this been the case, the TRC, as an official commission of inquiry, would have been comparable to Ashforth’s notion of the ‘Grand Tradition’ that addressed problems of racial strife through its investigative *ritual*.

²⁰⁹ Du Toit, “A Need For Truth”, p. 400-402

²¹⁰ Alex Boraine set up the NGO *Justice in Transition*, which facilitated early debates between civil society groups and the government on topics related to transitional justice and post-conflict reconstruction. Two conferences were held to host discussions. ‘Dealing with the Past’ (February 1994) drew on international experience on Transitional Justice from Eastern Europe and Latin America, [See Boraine, Alex, Janet Levy, and Ronel Scheffer, eds. *Dealing with the past: Truth and reconciliation in South Africa*. IDASA, 1997], whilst ‘Truth and Reconciliation’ (July 1994) focused on the South African context of transition and local issues. The proceedings of the July workshop were published under the title ‘The Healing of Nation’. Boraine, Alex, Janet Levy, and Kader Asmal. *The healing of a nation?*. Justice in Transition, 1995.

²¹¹ The principle of inclusiveness is also evident in the process by which the legislation that underpinned the TRC was written. See Boraine, *A Country Unmasked*.

²¹² See Albie Sachs and Leon Wessels, speaking at the Truth v. Justice conference in Somerset West, that refers specifically to the postamble to the interim South African constitution. It also lays out the compromise that resulted in the TRC. See also the chapters in Rotberg and Thompson, *Truth v Justice*, by Ntsebeza and Minow.

The difference with the TRC is that calls for the ‘truth’ concerning past political violence came from initiatives led by civil society and human rights organisations. This overwhelming public desire for truth inspired the inclusive process by which the founding legislation for the TRC was imagined and subsequently brought to life.²¹³

Although there was a popular will for the truth commission, it was also necessary that it be an *official* commission. Sufficient popular will and capability might have been able to set up an *unofficial* truth project guided by the religious communities, for instance. However, it was vital to the TRC, as a transitional institution, that it be an official commission to assist in legitimating the new democratic government. A civil-society driven commission may have been similarly committed to unearthing certain knowledge concerning past instances of human rights abuses; however it would not have had the same access or the means and resources of an official commission in attaining truth as ‘official acknowledgement’ of those past acts. Nor would it have engaged in the requisite measure of self-reflection by the South African state to assure the public that state-sanctioned violence of Apartheid’s proportion would never happen again. At the same time, the TRC was not entirely part of the regular state apparatus as it was an *independent commission* set up to exist for a finite period of time, unlike more permanent institutions like the Human Rights Commission.²¹⁴ The result was that the TRC had a complex

²¹³ Importantly, the TRC was the first ever truth commission where this was the case. As Hayner noted, “the public rarely plays a role in crafting the Terms of Reference of a truth commission”, adding that South Africa was the first example of such a process that was “officially opened to encourage public debate and input on the terms of a truth commission.” Hayner, “Fifteen Truth Commissions”, p. 639 (footnote 102). According to Transitional Justice expert Paul Gready this was, in part, because of rising political tensions within the Government of National Unity, where it became “convenient” for Dullah Omar, the new Minister of Justice, to organise contributions to the idea of the TRC “outside mainstream government structures,” Gready, *The Era of Transitional Justice*, p. 64

²¹⁴ Du Toit ‘Experiments with Truth and Justice’, p. 441

position in relation to both the state and society and moreover, made for a complex situation in which it sought to both accommodate and legitimate multiple forms of truth.

4.2.2 The Promotion of National Unity and Reconciliation (PNUR) Act's Impact on the TRC's 'truth-seeking' mandate

The PNUR Act prescribed two distinct types of inquiries in so far as it pertained to the question of gross human rights violations:

- (a) Was a gross violation of human rights committed and what was the identity of the victim?²¹⁵
- (b) What was the identity of those involved in such violations and what was their accountability for such violations?²¹⁶

The TRC's interpretation of this mandate was that (a) was strictly a factual question relating to victims of individual violations of human rights. The PNUR defined a gross human rights violation as killing, torture, severe ill-treatment, such as attempted killing and extreme bodily and/or mental harm inflicted; abduction, such as someone being forcibly or illegally "taken away".²¹⁷ According to the TRC, the factual question whether a gross violation had been committed on an identifiable victim did not include questions of accountability of the perpetrator(s). It stated "The question of whether the conduct of the perpetrator is justified is irrelevant".²¹⁸ The rationale for this was to allow for a greater number of victims to "benefit from the Commission's process".²¹⁹ (b), on the other hand,

²¹⁵ PNUR Act Section 4(b)

²¹⁶ PNUR Act Section 4(a)(iii), (v)

²¹⁷ TRC Report, Volume 1, Sections 109-120; Volume 5 Appendix 1

²¹⁸ TRC Report, Volume 1, Section 83(a)

²¹⁹ TRC Report, Volume 1, Section 84

was interpreted as involving more complex and “technical” issues determining accountability.²²⁰ As the report states,

“Findings emerging at this level of enquiry may have grave implications and impinge upon the fundamental rights of alleged perpetrators. This enquiry involves, therefore, both factual and legal questions.”²²¹

This placed the TRC in a complex situation in relation to its ‘fact-finding’ and ‘truth-seeking’ mandate. On the one hand it was to fulfil the generic function of a ‘fact-finding’ commission of inquiry identifying individual victims of gross human rights violations as defined by the PNUR Act. Making findings of this kind relies on some measure of verification through research. On the other hand it was required to make findings of legal accountability in its perpetrator findings. As stated in Chapter Two, making legal findings, or pursuing ‘judicial truth’, requires that rules of due process are observed. The implication is that two different methods of inquiry were necessary to fulfil this dual mandate. The Commission resolved that it could “find that a gross human rights violation had been committed because there was a victim of that violation. It had, however, to apply a *more stringent test* in order to hold a perpetrator accountable for that violation.”²²² The result was the need for two very different truth-recovery processes in the TRC’s proceedings. These were, broadly speaking, a victim-centred truth process; and a perpetrator-centred one, encompassing the Amnesty hearings.

Consequently, the TRC developed an ambiguous status as a truth and reconciliation commission seeking victim-centred truth while also functioning as a generic fact-finding

²²⁰ TRC Report, Volume 1, Section 85

²²¹ Ibid, p. 71

²²² TRC Report, Volume 1, Section 86 [emphasis mine] The additional stringency relates to following principles of due process in making findings of accountability.

commission of inquiry; it was mandated to compile an official historical record of Apartheid's political crimes but also to make quasi-judicial perpetrator findings. As Graeme Simpson stated, this established its "own dual role as a fact-finding, quasi-judicial enterprise obsessed with forensic truth and verifiable information on the one hand, and a psychologically sensitive mechanism for victim storytelling and 'healing' on the other."²²³ The following section shall unpack some ways in which this affected the TRC's 'fact-finding' and 'truth-seeking', while contributing to its narrative and legitimating functions.

4.3 Towards an understanding of the TRC's 'truth-seeking' with regards to past acts of political violence

As stated, the TRC was set up by the PNUR Act and not in terms of the Commissions Act of 1947. However, key elements of its modus operandi may be traced to the influence of the Commonwealth Inquiry tradition or other official commissions, like the Wessels Commission. Consequently the TRC borrowed its 'truth-seeking' practices from both Commonwealth Commissions and Latin American truth commissions, whilst also sharing some of the former's typical limitations. Like Commonwealth Commissions it adopted powers of search and seizure, summons and subpoena. Its founding legislation also contained provisions that enabled both public and in camera hearings, a standard practice in the history of Commonwealth Commissions. However, the TRC also adopted the 'victim-centred' features of the Latin American truth commissions, including broad

²²³Graeme Simpson, "Tell No Lies, Claim No Easy Victories: A Brief Evaluation of South Africa's Truth and Reconciliation Commission" in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission*, ed. D. Posel and G. Simpson. (Johannesburg: Witwatersrand University Press) p. 237

consultation with society in the appointment of commissioners, as well as mechanisms to provide victim-support and enforce certain obligations on government with regards to the findings of the report.²²⁴

4.3.1 The TRC's victim-centred 'truth-seeking' process

In many ways the pursuit of 'victim-centred' truth became the hallmark of the TRC's work. Hearings were televised so that the entire nation could watch the emotionally-charged scenes where family members of deceased victims faced perpetrators, imploring them to explain why they had done what they did. Individuals recounted gruelling scenes of torture suffered at the hands of state security forces; stories of pain, survival and resistance. Compared to the earlier Latin American truth commissions, where hearings took place in camera, the TRC was extraordinarily public and this public nature is one of the features that afforded it the label of a 'unique' and 'model' tool of transitional justice. However, the public hearings are less novel when viewed within the tradition of Commonwealth Commissions and the later South African commissions of inquiry, such as the 'Tumult Commissions'. As explained in previous chapters, the public hearings formed an integral part of the 'Grand Tradition' and functioned significantly in tumult commissions' 'legitimizing schemes'. Drawing upon legal discourses and procedures enabled the authorisation of findings as 'objective fact'. 'Official discourse' and 'legal discourse' functioned to legitimate both the work of the commission itself, and concomitantly the state that authorised it. These procedural schemes and its official status allowed a commission to speak truth *with* 'power, which can be linked to what Ashforth calls the 'Truth of State'. To what extent was TRC's 'truth-seeking' different from this?

²²⁴ Freeman, *Truth Commissions and Procedural Fairness*, p. 24

First, public hearings provided victims and survivors the opportunity to recount their story in front of an audience. According to Hayner, the public nature can “even symbolically offer an apology for past wrongs”.²²⁵ For Freeman, the public hearing component in contemporary truth commissions actually has less of a truth-seeking (or fact-finding) function than what appears, as those who testify will have already engaged in a process of statement-taking prior to being chosen to give testimony.²²⁶ Therefore, the public hearing process is a tool to “publicise the truth”, or “make a similar statement on a public stage”.²²⁷ Boraine’s account of the victims’ hearings emphasizes the symbolic effect identified by Hayner and the performance aspect identified by Freeman:

“The ritual, which is what the public hearings were, which promised truth, healing and reconciliation to a deeply divided and traumatized people, began with a story. This was the secret of the commission – no stern-faced officials sitting in a private chamber, but a stage... The audience was there too, and a much wider audience watched and listened through television and radio. It was a ritual, deeply needed to cleanse a nation. It was drama... But this was no brilliantly written play; it was the unvarnished truth in all its starkness.”²²⁸

The accounts by Hayner, Freeman and Boraine all echo Ashforth’s assertion that commissions of inquiry offer symbolic rituals that enact a particular ‘truth’, or official discourse on a subject. However, whilst the ‘Grand Tradition’ of commissions of inquiry and ‘Tumult Commissions’ drew on rituals of court-room proceedings, utilising cross-examination or the presence of experts or lawyers to verify ‘truth’ as objective fact, Boraine’s description of the TRC’s public hearings implies a ritual of a different kind.

²²⁵ Hayner, *Unspeakable Truths*, p. 225

²²⁶ Freeman, *Truth Commissions and Procedural Fairness*, p. 225

²²⁷ Ibid.

²²⁸ Boraine, *A Country Unmasked*, p. 99

Significantly there were no ‘stern-faced officials’ that could challenge the ‘story’ as told by the victim. Rather, the hearings provided a ‘stage’ giving the victim a further opportunity for ‘truth-telling’ that won’t be challenged. Moreover, the discourse in this context resonated with a religious, particularly Christian, narrative associated with baptism (i.e. that mankind is born with original sin and needs to be cleansed) serving to ‘cleanse’ the nation of past sin. The public hearing space created a fertile environment for the overarching discourse of forgiveness, reconciliation, catharsis and healing to take hold, often imbued heavily with religious overtones.²²⁹ The very notion of catharsis – a word often used in connection with the ‘truth-telling’ that occurred at the commission – denotes a *spiritual renewal*, where personal confessions became analogies for the wider process of social and political transformation and renewal.

On a separate, but related issue, the TRC to some extent allowed victims and survivors, and not only the functionaries of the state, to speak truth *with* power. For Gready, this is a critical distinction between generic commissions of inquiry that speak truth *with* power, and truth commissions that provide victims and survivors an opportunity to speak truth *to* power.

“While one cross-cutting source of legitimacy – objectivity – allies their work with that of state inquiries, another marks a departure: human rights activists seek both to legitimise their own activities and to legitimise or delegitimise state practice with reference to international human rights law. This marks a parting of the ways

²²⁹ The victims’ hearings had a distinctively religious and ceremonial aspect. Often, sessions were opened by prayer led by the Chairperson, Archbishop Desmond Tutu who would light a memorial candle. Religious and traditional hymns would be sung. The TRC report acknowledges that the religious aspect was a point on which the Commission was often criticised, especially as its orientation was overtly Christian. However the commission maintained that the Christian overtones were thought to be appropriate in a country where the majority of the population is Christian. *TRC Report*, Volume 5, Chapter 1, Section 10

with state inquiries as, rather than speaking truth with power, it often demands the more strident function of speaking truth to power, specifically state power”.²³⁰

Gready further asserts that the TRC, as an official truth commission, undertook a “complex balancing act, speaking truth both with and to power”.²³¹ The “complex balancing act” was derived from the fact that the TRC was an official commission but not entirely part and parcel of the state, while its mandate effectively derived from input by civil society.

4.3.2 ‘Truth’ as a means to transitional justice

Conceived as a transitional justice instrument the TRC’s public ‘truth-seeking’ process had consequentialist aims that went beyond ‘fact-finding’. Establishing the ‘truth’ about past human rights violations was conceived as means to achieve the broader aim of national unity and reconciliation, as made evident by the very title of the PNUR Act. In the same way the TRC was also concerned with restoring the rule of law, enhancing respect for human rights as well as restoring moral order. This logic is summed up by the Chairperson Archbishop Desmond Tutu in the following extract from the TRC Report:

“In our case, dealing with the past means knowing what happened. Who ordered that this person should be killed? Why did this gross violation of human rights take place? We also need to know about the past so that we can renew our resolve and commitment that never again will such violations take place. We need to know about the past in order to establish a culture of respect for human rights. It is only by accounting for the past that we can become accountable for the future.”²³²

²³⁰ Gready, *The Era of Transitional Justice*, p. 33

²³¹ Ibid, p. 37

²³² Forward by Chairperson. *TRC Report* Vol 1, Chapter 1, Section 28

This statement implies some form of causal link between acknowledging past political crimes, and the prevention of the reoccurrence of such acts occurring in a nation's future.²³³ This is familiar theme of contemporary human rights discourse. As Richard Goldstone, the former chief prosecutor for the ICTY and ICTR noted, "the only hope of breaking cycles of violence is by public acknowledgement of such violence and the exposure of those responsible for it."²³⁴

The task of transitional justice bodies is also typically conceived in terms of having to (re)define a moral standard where that standard had been manipulated, or lost altogether. As Wilmot James asserted during early discussions on the TRC,

"To me it marks a moral shift between a past and a future. It is desirable to *introduce a range of values*, procedures and mechanisms in a wide variety of areas of society that make the announcement of this break with the past a democratic one. The idea of having a commission of truth and of looking at questions of corrective justice is part of that".²³⁵

Hence, the TRC's public truth process was conceived as a *means towards transitional justice*. This entailed the deliberate confrontation of past acts of political violence, rather than justifying them. It also implies that divulging the 'facts' of past human rights violations had a *transformative agenda*. The idea was that 'truth' would enable societal

²³³Similarly, Chilean human rights advocate José Zalaquett argued that a nation's unity "depends on a shared identity, which in turn depends largely on shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from reoccurring." Zalaquett, José. 1995, "Balancing ethical imperatives and political constraints: the dilemma of new democracies confronting past human rights violations" In: Kritz (Ed.) *Transitional Justice*, p. 43. Zalaquett's notion of social catharsis can be linked to Nagel's notion of public acknowledgement of past political crimes.

²³⁴Richard Goldstone, "Exposing human rights abuses: a help or hindrance to reconciliation?" *Hastings Constitutional Law Quarterly*. Vol. 22, No. 3 (1995), p. 22

²³⁵ Wilmot James' contribution at the conference 'Dealing with the Past'. Alex Boraine, Janet Levy, and Ronel Scheffer. 1994. *Dealing with the past: truth and reconciliation in South Africa*. Cape Town: IDASA. p. 134. 'Corrective justice', as used by James, may be taken as a synonym for transitional justice in so far as both involve a certain kind of retrospective justice in relation to a former regime.

transformation. However, the TRC's status as a commission of inquiry that sought objectively verifiable facts into gross human rights violations, appears to have undermined the possibility of substantive social transformation.

4.4 Objective fact-finding and 'bureaucratic truth production' in the TRC's Report: A legitimating scheme?

The previous section set out some of the victim-centred 'truth-finding' objectives of the TRC that were framed by the various objectives of 'truth', 'corrective' (transitional) justice, reconciliation and national catharsis. This section looks towards the TRC's actual practices for determining truth which were complex and changed over time.

The eventual report distinguished between four types of truth. These were, factual or forensic truth; personal or narrative truth; social or dialogue truth and healing or restorative truth.²³⁶ The differences between these different types of truth remained conceptually unclear. One might surmise that the victims' hearings -- part of the systematic effort to provide a public platform for victim 'truth telling' as integral to the national aim of 'dealing with the past' -- was related to the notion of *personal or narrative truth*. As stated previously, the TRC understood that these 'truths' were not considered appropriate to meet the due process requirements that perpetrator findings would necessitate. The 'social or dialogue truth' and 'healing or restorative truth' appear related to communal reconciliation or initiatives where the 'truth' that emerged was to facilitate reconciliation between victims and perpetrators. This can be linked to the notion of 'truth

²³⁶ TRC Report, Volume 1, Chapter 5, Section 29-45

as acknowledgment'.²³⁷ As Deborah Posel stated, 'factual' truths were identified as that type of truth which is *not* concerned with acknowledging the subjective experience of individuals or with divulging personal narratives.²³⁸ The implication is that 'factual truths' were seen as neutral, or 'objective'.²³⁹ However, the arguments by Buur, Wilson and Mamdani below suggest that the TRC's 'factual truth' was far from neutral or objective. It appears that the TRC attempted to legitimate the 'personal' and 'narrative' truths of victims' testimonies by framing its proceedings and final report in the official discourse of human rights, and reconciliation. However, by doing so, the TRC was self-limiting in its definition of 'factual truth' as contained within the controlled vocabulary of 'gross human rights violations'.

Buur argued that the TRC's public hearings, and final report produced ritualised public representations of the past that cannot be divorced from the environment of on-stage truth telling and 'bureaucratic truth' production within which they were framed.²⁴⁰ The TRC's database and information management system was based on a design developed by the American Association for the Advancement of Science, and planned the way the TRC would operate in detail. As Buur noted,

²³⁷ "It is in this context that the role of 'acknowledgement' must be emphasised. Acknowledgement refers to placing information that is (or becomes) known on public, national record. It is not merely the actual knowledge about past human rights violations that counts; often the basic facts about what happened are already known, at least by those who were affected. What is critical is that these facts be fully and publicly acknowledged. Acknowledgement is an affirmation that a person's pain is real and worthy of attention. It is thus central to the restoration of the dignity of victims", *TRC Report*, Vol 1, Chapter 5, Section 45.

²³⁸ Deborah Posel, "The TRC Report: What Kind of History? What Kind of Truth?" in *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Johannesburg: Wits University Press, 2002), p.156

²³⁹ The very terms used, 'factual or forensic truth', imply a strict process of verification has taken place comparable to a scientific or forensic investigation.

²⁴⁰ Lars Buur, 'Monumental Historical Memory: Managing Truth in the Everyday Work of the South African Truth and Reconciliation Commission', in Posel and Simpson (eds), *Commissioning the Past*, p. 66

“In order to get the right information for the database, an extensive and elaborate information management system was set up.... It had outlined staff structure, the qualifications necessary for each position, the internal organization of the commission, how the truth of the past should be collected and how it could be represented.”²⁴¹

This information management system had a decisive impact on the structure of the commission’s work, as well as on the nature of the findings published in the final report.²⁴² Buur further argued that the realist and legalistic language of the TRC decontextualized and depoliticised the events due to the tendency of the universalistic discourse of human rights to strip events of their particular or localised meanings. Richard Wilson likewise stressed the decontextualising effects of the TRC’s bureaucratic process of ‘truth production’. To quote Wilson directly, “[L]ife becomes text becomes genre”.²⁴³ On some level, this may have allowed victims to speak truth to power; but as Gready also noted, speaking of one’s experience in the language of human rights privileges a liberal, universal, legal agenda over personal and local politics.²⁴⁴ The behind-the-scenes bureaucratic process of ‘truth production’ codified and classified human experience into data, or the controlling vocabulary of *gross human rights violations*.²⁴⁵ This process had a decisive impact on the TRC’s findings, which showed the results of a “positivistic human rights documentation methodology”.²⁴⁶

²⁴¹Buur, ‘Monumental Historical Memory’, p. 68

²⁴² For details on the TRC’s use of the INFOCOM system see André Du Toit, “Perpetrator finding’s as artificial even-handedness? The TRC’s contested judgements of moral and political accountability for gross human rights violations” (1999)

²⁴³ Wilson, R. *The politics of truth and reconciliation in South Africa: Legitimizing the post-Apartheid state* (Cambridge University Press, 2001) p. 146

²⁴⁴Gready, *The Era of Transitional Justice*, p. 37

²⁴⁵Buur, ‘Monumental Historical Memory’, p. 67

²⁴⁶*Ibid.*

The TRC thus adopted a conventionally positivist stance to ‘truth-recovery’ in providing its empirical overview of Apartheid’s violence. Scholars like Audrey Chapman argued that in so doing, the TRC was acting within its mandate.²⁴⁷ However Buur questions the assumptions underlying the TRC’s interpretation of its task as defined by the PNUR Act. The Act did not actually make specific provision for adherence to a positivistic scientific ideal per se, but rather used terms like ‘objectivity’, ‘even-handedness’, and ‘independence’.²⁴⁸ Buur cites personal conversations with TRC staff members who understood this to mean that the TRC should be independent from political influences and not ‘take sides’, i.e. to be even-handed.²⁴⁹ However, the TRC rather chose to interpret this very general reference to ‘objectivity’ within the Act as designating a positivistic and scientific approach to its ‘truth-finding’ task. Why was this the case?

One reason is that it may have merely been a reflection of the ‘positivist assumptions’ inherent in “mainstream social science and law in South Africa”.²⁵⁰ Indeed, viewed in isolation this may suffice as a reasonable explanation. However, when viewed within a chronology of colonial and post-colonial ‘Tumult Commissions’ inquiring into violence against political subjects –which were also official attempts to restore social order, or ‘peace’ -- the TRC’s turn to a formal conception of ‘truth as objectivity’ is entirely consistent with the ‘regime of truth’ in which the ‘Grand Tradition’ of commissions of

²⁴⁷Chapman, ‘Truth Commission Processes’, 7. An appendix to the final report also suggests that the TRC saw its overall task as ‘scientific’ (*TRC Report* Vol 1, ch 6, Appendix 1, pp 161-2) The term ‘positivist approach’ is referred to in the Management and Operational Report on Information Management.(Volume 1, ch.11, para.11);

²⁴⁸Cited in Buur, ‘Monumental Historical Memory’, p. 68 Footnote 15

²⁴⁹This would be consistent with the Act which states: “[The] Commission, its Commissioners and every member of its staff shall function without political or other bias... and shall be independent and separate from any party, government, administration, or any other functionary or body directly or indirectly representing the interests of any such entity’, Section 36.1

²⁵⁰Buur, ‘Monumental Historical Memory’, p. 68 Footnote 15

inquiry and indeed ‘Tumult Commissions’ like the Wessels Commission, had operated in South Africa. Giving primacy to ‘truth as objectivity’ served a particular scheme of legitimation for the TRC. The vindication of victims’ truth through the process of the information management system, along with the analyses of researchers and academics, served to afford it the status of official historical memory.

4.5 The ‘truth’ about Apartheid Violence or a whitewashing machine avoiding accountability?

Whilst the TRC acknowledged that it was not a legal body authorised to apportion criminal liability;²⁵¹ a significant portion of the TRC’s work concerned making perpetrator findings.²⁵² Unlike most other truth commissions the TRC identified individual perpetrators as morally and politically accountable for committing gross violations of human rights. There are many arguments concerning the TRC’s amnesty process, which cannot be covered in this thesis. The relevant question is how ‘perpetrator findings’ fit within the ‘fact-finding’, ‘truth-seeking’ and narrative function of official commissions. How did the TRC’s discursive operationalization of ‘amnesty’ within the context of a national reconciliation project differ from the narrative functions of the *tragic discourse* of ‘Tumult Commissions’ that whitewashed acts of state violence as legitimate violence?

²⁵¹“...the Commission is not a court with the power to punish those identified; legal rights and obligations are not finally determined by the process” *TRC Report*, Volume 1, p154. See also Chapter 1, Section 46. “This hearing is not a court of law, it is a forum in which especially the so-called little people, those who’s stories have not generally been told to a wide audience are given the opportunity of telling their stories. But although it is not a court, we seek to have a proper decorum - we hope that all of you are moved to want to have a dignified setting in which such often horrendous stories can be told. It is part of our response to those stories that we gave people a dignified setting in which to tell them.” Opening Statement by Archbishop Desmond Tutu. The TRC Victims Hearings, George, 18th June 1996.

²⁵²“No other state had combined this quasi-judicial power with the investigative tasks of a truth-seeking body” *TRC Report I*: 4, 54

4.5.1 The TRC's 'Conditional Amnesty': "Accountable Amnesty vs Impunity"²⁵³

The legitimating and narrative functions of colonial and Apartheid 'Tumult Commissions' were explained, by Sitze, as invoking an official 'tragic discourse', which was evident as the 'literary' mode through which colonial officials in the JRC and state functionaries in the Wessels Commission "spoke about its officials who killed with impunity".²⁵⁴ The official discourse of those commissions posited the state's violence as legitimate, as opposed to the alleged illegality and illegitimacy of the protest action. Within the genealogy of 'Tumult Commissions' this may be viewed as schemes to rationalise the application of amnesty. These schemes were both practical and discursive.

First, amnesty applications to the TRC had to be individual.²⁵⁵ Amnesty was also justified as an 'amnesty-for-truth' exchange. It was required that applicants complete an official form in which they provided the 'whole truth' concerning the specific human rights violations they had committed, where full disclosure was a necessary condition for consideration. Moreover, applicants had to appear before an amnesty hearing, which was open to the public. To qualify, the violation(s) had to have taken place between 1960 and 1994 and applications had to be submitted between December 1995 and May 1997.²⁵⁶ Lastly, applicants were only considered for amnesty if the violence could be deemed to be

²⁵³This is taken from the title of the section in the TRC Report, Volume 1, Chapter 5, 'The context of transition: accountable amnesty versus impunity'

²⁵⁴Sitze, *The Impossible Machine*, p.164

²⁵⁵As Boraine wrote in his memoir "there was no such things as collective indemnity". Boraine, *A Life in Transition*, p. 201

²⁵⁶ TRC Report Volume 1

political violence, i.e. if the gross human rights violation had been *committed with a political objective*.²⁵⁷ This framed the TRC's amnesty as an "accountable amnesty".

Sitze provides a compelling interpretation of the TRC's experiment with 'truth' and amnesty (or indemnity) setting it apart from 'Tumult Commissions'. He argues that the TRC's apportioning of amnesty represented a 'final' form of indemnity for South Africa. The former Apartheid regime had enacted a series of Indemnity Acts protecting state officials and members of the defence force *ex post facto*, for violating laws passed by the Apartheid state's own parliament. For Sitze, the TRC's operationalization of indemnity laws amounted to 'genius' as it utilized the very institutions of apartheid-era emergency laws as the juridical basis upon which to expose and critique human rights violations committed under those emergency laws.

"The genius of the TRC, more latent than manifest, was to have attempted to reiterate a set of manifestly colonial juridical forms as part of an endeavour to prescribe a postcolonial political order. It was to have attempted to turn existing precedents of state domination back on themselves in order to put those precedents to rest".²⁵⁸

Similarly Du Bois-Pedain's analysis of the TRC's amnesty process concluded that "the amnesty provisions in the TRC Act still betray their roots in a long legislative tradition

²⁵⁷ The TRC Report, Volume 1, Chapter 5, Section 60(a)-(h). It is important to note that initially (in terms of the 'Norgaard principles'), there had been an additional 'prerequisite' of proportionality in discerning whether an act had been committed with a political objective. However, in practise, the proportionality test was dropped by the Amnesty Committee. As Sitze indicates, the "necessity" test for indemnity during the Apartheid era was precisely, a *subjective* test -- whether the official concerned believed that they had committed violence to preserve or restore the safety of the (white) population. Hence, in restricting itself to the question of the amnesty applicant's subjective belief, the Amnesty Committee can be viewed as having allowed apartheid-era indemnity to survive in the new, democratic South Africa. *The Impossible Machine*, p. 107, p.191-193

²⁵⁸Sitze, *The Impossible Machine*, p. 253

that affords special treatment to (at least some) *politically motivated crimes*".²⁵⁹ However when used by the TRC and framed within the discourse of 'accountable amnesty' it was intended to nourish the broader official discourse of national unity and reconciliation.

Ronald Slye provides a relevant qualifier that I use to distinguish between the indemnity of 'Tumult Commissions' and the amnesty of the TRC. In an article, Slye asks whether 'legitimate amnesty' is possible.²⁶⁰ He distinguishes different types (amnesiac amnesty, compromise and corrective kind) but ultimately argues for "accountable amnesty", which are "amnesties that provide some accountability and more than minimal relief to victims".²⁶¹ For him, the South African amnesty came closest to qualifying as accountable amnesty.

Moreover, the indemnities that preceded 'Tumult Commissions' legitimated state violence and rendered the use of violence by rebelling groups of civil society 'illegitimate', both according to law, but moreover in the official discourse on violence within which events were framed. In accordance with Slye's formulation, it becomes clear that the amnesties granted by the TRC were not designed to exculpate agents, nor to support a narrative into the necessity of the use of police and military force in suppression. They

²⁵⁹ Antje du Bois-Pedain, *Transitional Amnesty in South Africa* (Cambridge: Cambridge University Press, 2007), p. 24. Sitze further asserted that the Indemnity Act (1990) and the Further Indemnity Act (1992) passed by the NP government meant that state agents were already effectively indemnified for crimes committed, which neutered the desired 'carrot and stick' approach of the conditional amnesty process. However, speaking at an IDASA conference in 1994, Lourens du Plessis noted that it was "unlikely that the existing indemnity acts will survive constitutional review" as the postscript to the Constitution was "an appropriate and purposeful standard against which existing legislation on indemnity [could] be tested" and that the courts could use the postscript as a reference to determine "which values would prevail in respect of indemnity for acts associated with political objectives in an open, democratic, reconciled and reconstructed 'new' South Africa based on principles of freedom and equality". Du Plessis, "Amnesty and Transition in South Africa" in *Dealing with the Past*, p. 114

²⁶⁰ Ronald Slye. "Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?", *Virginia Journal of International Law*. Vol. 43 (2002), p. 173

²⁶¹ Ibid.

were focused on *exposing and acknowledging* human rights abuses, which they did by making perpetrator findings on the ANC, as well as on the leaders and agents of the Apartheid state. Rather than excusing violence committed with a political objective, the TRC stood firm by the principle that gross human rights violations be approached even-handedly, irrespective of the “justice of the cause” of the various conflicting parties.²⁶² Therefore, the TRC made perpetrator findings of moral and political responsibility and accountability for committing or facilitating gross human rights violations.²⁶³

4.5.2 The TRC within the ‘Grand Tradition’ of Commissions of Inquiry.

When compared with ‘Grand Tradition’ Commissions of Inquiry, one can begin to identify the specific role that the TRC played in legitimating South Africa’s new democratic political order. As noted, one particular ‘legitimizing scheme’ involved in this process, according to Ashforth, was the role of ‘experts’. Specifically he conveys that expert testimony was used to validate a ‘scientific’ differentiation of ‘natives’ from ‘non-natives’. However, the ‘scientific’, or, neutral findings were hardly neutral, but rather fed into the official discourse that served the grander political project of ‘Separate Development’. The TRC used similar schemes of legitimation when verifying specific facts on particularly violent events in its ‘Event Hearings’. These hearings were used to inquire both into the

²⁶² The TRC’s even-handed approach to making perpetrator findings on the ANC, and the liberation movement was highly criticised by the ANC government. Thabo Mbeki claimed that the TRC’s findings were an attempt to “delegitimise or criminalise a significant part of the struggle” for liberation, which was framed within the ‘just war’ paradigm. See du Toit, “Perpetrator findings as Artificial Even-handedness,” p.32

²⁶³ In addition to the NP leadership, the TRC found that the ANC was “morally and politically accountable for creating a climate in which such supporters believed their actions to be legitimated when carried out within the broad parameters of a ‘people’s war’ as enunciated and actively promoted by the ANC”. *TRC Report*, Volume 2. Chapter 4, Section 97

Similarly it found that the United Democratic Front (UDF) and its leaders “failed to exert the political and moral authority available to it to stop such practices... In particular the UDF and its leadership failed to use the full extent of such authority to end the practise of necklacing, committed in many instances by its members and supporters. *TRC Report*, Volume 2, Chapter 4, Section 229

‘micro truths’ of the event, but also the ‘macro-truth’ that the event signified, in terms of its long term ideological and structural causes:

“These hearings explored the context in which a specific event occurred and typically involved testimony not only from victims but also from alleged perpetrators *and experts with specific knowledge about the event or issues related to it.*”²⁶⁴

Whilst there was little use of ‘experts’ within the proceedings of the public hearings, experts were used extensively by the TRC’s research department, in the ‘information management system’ and within the TRC’s investigative unit.²⁶⁵ The expert input served to enable the TRC’s fact-finding operations within its narrowly-defined understanding of gross human rights violations.

However, all findings of ‘fact’ were framed within the overarching discourse of political transition, reconciliation and national unity. To reiterate, the South African transition was precipitated by an elite-led negotiated settlement and not a social revolution. Hence, the terms of the TRC were circumscribed by the Interim Constitution and the PNUR Act, which prescribed ‘fact-finding’ into the victims and perpetrators of Apartheid. Therefore, like the ‘Grand Tradition’ commissions, the TRC could only reformulate but not fundamentally challenge questions of economic policy, labour and capital control and

²⁶⁴ *TRC Report*, Chapter 6: ‘Methodology and Process’, Section 37 [Emphasis mine]. Event hearings were held on the 1976 Soweto student uprising; the 1986 Alexandra six-day war that followed attacks on councillors, the KwaNdebele/Moutse homeland incorporation conflict; the killing of farmers in the former Transvaal; the 1985 Trojan Horse ambush by the security forces in the Western Cape; the 1986 killing of the ‘Gugulethu Seven’, following security force infiltration of African National Congress (ANC) structures in the Western Cape; the 1990 Seven-Days War, resulting from IFP-ANC clashes in the Pietermaritzburg area; the Caprivi Trainees, who were trained by the South African Defence Force (SADF) and deployed in KwaZulu-Natal as a covert paramilitary force in 1986; the 1960 Pondoland Rebellion, in response to the imposition of the Bantu Authorities Act which prepared the way for the independent homelands; and the 1992 Bisho Massacre, in response to an ANC national campaign for free political activity in the homelands.

²⁶⁵ See *TRC Report* Volume 1, Chapter 6, Section 50

rather disguised the particular socio-economic and structural violence of Apartheid. Mamdani's critique is illuminating in this regard. For Mamdani the consequence of the TRC's *narrow truth* based upon the rubric of gross human rights violations led to its concealment of what was specific about Apartheid as a crime against humanity within a protracted history of conquest and dispossession -- the deprivation of land and livelihoods through land laws and the Group Areas Act.²⁶⁶ To use Rosenberg's distinction, the TRC analysed Apartheid's repression in the context of a 'regime of criminals', rather than being also a 'criminal regime' *par excellence*.

In Mamdani's view the TRC identified a minority of individual perpetrators and victims, whilst obscuring the majority of beneficiaries of Apartheid as a system that "defended power by denying people rights".²⁶⁷ When linked to 'Tumult Commissions' which 'whitewashed' past events with a more palatable truth, this resonates with the 'truth' as told by the TRC. Mamdani asks,

"Imagine that there was a truth commission in the Soviet Union after Stalin, and this commissions said nothing about the Gulag. What credibility would it have? The South African Gulag was called forced removals. Between 1960 and 1982, an estimated 5.3 million people were forcibly removed, their communities shattered, their families disposed and their livelihoods destroyed".²⁶⁸

In accounting why the TRC had defined its gross human rights violations so narrowly, the response is wholly pragmatic. As reported by the TRC,

²⁶⁶Mahmood Mamdani, "The truth according to the TRC." *The Politics of Memory: Truth, healing and social justice* (2000): 176-83.; Mahmood Mamdani, "Amnesty or impunity? A preliminary critique of the report of the Truth and Reconciliation Commission of South Africa (TRC)." *diacritics* 32, no. 3 (2002): 33-59.

²⁶⁷ Mamdani, "The truth according to the TRC", p. 179

²⁶⁸Mamdani further notes that forced removals were not outcomes of passive social forces, but the effects of policies advocated by specific individuals and enacted by state officials. *Ibid*, p. 180

“it became increasingly clear that there would be *no value* in simply handing the government a list which included a broad category of unidentified persons for consideration as victims deserving of reparations”.²⁶⁹

The question that arises is ‘*value* for whom?’ This may be compared with Ashforth’s explanation of the ‘Native Question’ commissions of inquiries schemes of legitimization:

“Commissions of Inquiry must reconcile knowledge of *particular group values and ideologies*...with knowledge of *material objectives* and *practical possibilities*; of showing *how* and *what* is desirable can be made *practical*.”²⁷⁰

In the case of official commissions in the context of capitalism, the material objectives are necessarily those of state (or powerful capitalist forces supported by the state). In the TRC the ‘practical possibilities’ for making binding recommendations that would have enabled some measure of distributive justice were constrained by the ‘regime of truth’ within which the TRC operated. Consequently the TRC produced a list of individual names of victims identified for reparation, but made no reference to communities and groups, despite the fact that the ‘truth’ of Apartheid as a crime against humanity, was that it targeted, and traumatised, entire groups. The practical effect was that the possibility of communities receiving reparations was removed from public discourse entirely, and the official line of discourse and action would be individual and symbolic reparations for the TRC’s defined victims.²⁷¹

This pragmatic discourse is evident in the text of the commission report itself, in the section outlining the TRC’s core ‘concepts and principles’.²⁷²

²⁶⁹ *TRC Report*, Volume 1, Chapter 4, Section 134

²⁷⁰ Ashforth, *Reckoning Schemes of Legitimation*, p. 6

²⁷¹ Mamdani, “Amnesty or impunity?” p. 33-59

²⁷² *TRC Report*, Volume 1, Chapter 5, Section 24-26

“The road to reconciliation, therefore, means both material reconstruction and the restoration of dignity. It involves the redress of gross inequalities and the nurturing of respect for our common humanity. It entails sustainable growth and development of the spirit of *ubuntu*. It implies wide-ranging structural and institutional transformation and the healing of broken human relationships. It demands guarantees that the past will not be repeated. It requires restitution and the restoration of our humanity - as individuals, as communities and as a nation.”²⁷³

We may note the ambiguous language that emphasises a narrative of social peace, healing and national unity. Terms like ‘material reconstruction’, ‘redress of gross inequalities’, and searching for ‘sustainable growth’ and ‘institutional transformation’ linguistically steers South Africa’s narrative of transition away from radical economic redistribution and towards a vision of ‘closure’. Considering White’s argument on the function of narrative genres, one can assert that the grand narrative of national unity and reconciliation contained inherent ideological, material and political choices. Of course, and as the Marikana Massacre also demonstrated, these choices had direct socio-political consequences for the material wealth distribution in post-Apartheid South Africa.

4.6 Conclusion

The TRC is by far the most complex of the official truth-seeking institution studied in this thesis and this chapter raised a number of critical points regarding the TRC’s inception, powers and its ambivalent ‘fact-finding’ and ‘truth-seeking’ mandate. The chapter could not and did not attempt to provide a critique of the TRC as a model of transitional justice, nor did it evaluate the truth or falsity of its findings per se. Rather, revealing the place of

²⁷³TRC Volume 1, Chapter 5, Section 24-26

the TRC within the chronology and context of Royal and Commonwealth Commissions showed striking similarities with the TRC, despite the different contexts in which they emerged.

This particular analytical lens enabled a critical review of the underlying and operative conceptions of ‘truth’ as they were actualised in the TRC’s work, including the implicit assumptions and implications of its bureaucratic truth production methodology. Citing the TRC report itself as well as some of its key architects suggests that the TRC’s operative notion of truth was drawn from Nagel’s ‘truth as acknowledgement’ as it began with a focus on victim truth-telling as a means to achieve recognition, transitional justice and reconciliation. However, the final report suggests a different fixation. The final report reflects the consequences of a technical information management system, presented as the factual truth of Apartheid’s abuses. In congruence with the function of ‘grand tradition’ commissions, the TRC’s official discourse of Apartheid violence depoliticised and reconceptualised contentious issues by applying a totalising narrative order to the period under investigation.

In Chapter One I cited Alex Boraine, who stated that transitional justice fills a liminal space in transitional societies, in which the “old order is dying but ... the new order has not yet been born.”²⁷⁴ It is in fact an optimistic reformulation of Antonio Gramsci’s assertion made in his *Prison Notebooks*, “The crisis consists precisely in the fact that *the old is dying and the new cannot be born.*”²⁷⁵ As an institution designed to mark a ‘new’ democratic society, the TRC’s main catalyst – the decision that there would be amnesty –

²⁷⁴Boraine, "Transitional justice: A holistic interpretation", p. 17

²⁷⁵ Antonio Gramsci, *Selections from the Prison Notebooks*, Ed. and trans. Q. Hoare and GN Smith (New York: International Publishers, 1971) p. 276

was rooted in the 'old', colonial practise that indemnified and legitimated state violence enacted with 'political motive'. However, spoken in the 'official discourse' of 'accountable amnesty' indemnity functioned to expose the 'truth' of perpetrators' crimes, and hence partition South Africa's constitutional democracy from Apartheid's parliamentary sovereignty. In this sense, the TRC was simultaneously revolutionary and reformist

It is evident that the TRC attempted to go beyond the 'fact-finding' role of general commissions of inquiry and it was influential in entrenching a discourse and praxis centred on 'truth-seeking' for the overall purposes of reconciliation and nation-building when powerful members of society had opted for amnesty. However, the status and function of the TRC as an *official* commission of inquiry whose mandate came primarily from civil society made for a complicated institution. Compared to Ashforth's Grand Tradition in which commissions spoke the official 'truth of power'; the TRC attempted to speak truth both *with* the power of the new democratic state (to and about Apartheid's victims and perpetrators) but also attempted to speak truth *to* the former Apartheid state, as well as *to* the democratic ANC government. This constituted the amalgamation of a range of various forces, where on the one hand its official discourse and practise was geared towards a religious and therapeutic narrative of catharsis and social reconciliation, whilst on the other hand it involved quasi-judicial legal discourse in determining 'objective' truth and making perpetrator findings in the final report.

Hence, on the one hand the TRC was a game changer in the way it facilitated public truth-telling for victims of gross human rights violations in a way never seen in the 'Native Question' and 'Tumult Commissions'. However, when that was combined with its determined perpetrator findings its functions were unclear. To a large extent this hinges

on the fact that the TRC was not a court of law. However, to avoid being a ‘whitewashing machine’, it sought to make even-handed, yet determinate findings of accountability and responsibility for crimes of gross violations of human rights.

Nonetheless, the meaning of these findings was, and remains ambiguous. As an investigative body and not a legal tribunal, how appropriate was it for the TRC to make findings of political accountability, and responsibility? The TRC acknowledged that making perpetrator findings required a more ‘stringent test’; however, it is not clear what the TRC understood this ‘test’ to be. It appears that the TRC defaulted to the legitimating schemes of both the ‘Grand Tradition’ of commissions of inquiry and ‘Tumult Commissions’ using the ‘proper decorum’ of the court of law. However, it was also not clear what the relationship was between the TRC’s perpetrator findings to the amnesty process on the one hand, and to the courts on the other. In effect, the ‘truth’ produced by the TRC raises far more questions regarding the actual role, status and function of official truth-seeking commissions, than it provides closure.

In a recent conversation I had with Adam Ashforth, he wrote “the TRC is certainly in the Grand Tradition, possibly the grandest”. The failure of the TRC to devise a satisfactory scheme of legitimation was related to the fact that, with the advent of democracy, it was no longer necessary for the state to find a way of speaking of, for, and to ‘the Natives/Bantu/Blacks...’ since genuine politics had arrived.²⁷⁶ It appears that twenty-two years into an ANC-led democratic government, the state still struggles to reconcile

²⁷⁶Adam Ashforth, e-mail message to author, August 30, 2016

participatory democratic politics with an appropriate scheme of legitimation in the Marikana Commission of Inquiry.

Chapter 5: Conclusion of Thesis

“It is ... true that every new movement, when it first elaborates its theory and policy, begins by finding support in the preceding movement, though it may be in direct contradiction with the latter. It begins by suiting itself to the forms found at hand and by speaking the language spoken hereto. In time the new grain breaks through the old husk. The new movement finds its forms and its own language.” – Rosa Luxemburg²⁷⁷

5.1 Revisiting the problem statement

This thesis began by problematising the proclaimed aims of the Marikana Commission of inquiry -- attaining ‘truth’, ‘justice’, and ‘healing’ -- both in terms of its mandate as well as its legal status as a generic commission of inquiry, and not a court of law or a truth commission. An analysis of commissions of inquiry in South Africa similarly problematised their use as official means to devise authoritative ‘solutions’ to particular ‘problems’ of governance by engaging in a seemingly ‘objective’ inquiry whose findings were not neutral but guided by certain ‘truth regimes’.

The word ‘tumult’ denotes a state of dire confusion, or disorder – the opposite of ‘peace’. In a sense, each commission considered in this thesis constituted an official attempt to seek the ‘truth’ in order to restore social order, or [relative] ‘peace’ after a tumultuous event or period of history in which the internal contradictions of an unjust social order became untenable and led to rebellion or, to use Hegel’s analogy, a ‘struggle to the death’ of the most corporeal kind. In these contexts, one may agree with Gready that ‘truth’ becomes a narrative genre encompassing the work and reporting of state commissions of

²⁷⁷ Rosa Luxemburg, “Reform or Revolution” <https://www.marxists.org/archive/luxemburg/1900/reform-revolution/intro.htm>

inquiry as well as that of historical commissions and truth commissions.²⁷⁸ Often the prescribed ‘solutions’ identified tended to obscure rather than reveal the underlying truths that were the root cause of the social disturbance – an inherently unequal and unjust social order. The specific problem posed by the thesis as its research questions were:

What are the various functions of official, “truth-seeking” commissions of inquiry in South Africa, from Sharpeville (1960) to the TRC (1995-2002), to Marikana (2012)?

What are the main issues associated with official ‘truth-seeking’ when official discourse legitimates political violence?

These research questions were explored using an analytical framework that problematised the notion of ‘official truth-seeking’ following state-sanctioned political violence. The complexity of the relationship between ‘truth’ and (state) power in official truth-seeking institutions was indicated by distinguishing speaking ‘truth *with* power’ and speaking ‘truth *to* power’, as well as through the distinction between truth as *knowledge*, and truth as *acknowledgement*. I also introduced the distinction between the various functions of official commissions as:

- a) Objective *fact-finding*, in accordance with the basic mandate of generic commissions of inquiry;
- b) Official *truth-seeking*, as a distinctive claim of dedicated investigations of state violence (i.e. as seen in historical commissions, tumult commissions and truth commissions); and

²⁷⁸See Gready, *The Era of Transitional Justice*, p. 20-25

- c) The *legitimizing* function of the official discourse of commissions of inquiry and the associated narrative genres (e.g. ‘forensic discourse’, ‘tragic discourse’, ‘legal discourse’ and ‘reconciliation discourse’).

It was shown that official investigative commissions exhibit inherent problems when they also made determinate findings into the responsibility of certain actors for unlawful, or extrajudicial killing. A further paradox lies in the discourse of tragedy that effectively exonerates perpetrators by legitimating the use of force inflicted by state security forces, whilst delegitimising civil protest and resistance. The TRC proved to be a qualitatively different institution as it sought to disclose and delegitimise human rights violations indiscriminately by exposing the truth as a means toward transitional justice. The TRC also sought to expose the limits of justifications of political violence by its even-handed identification of perpetrators of gross human rights violations. Nonetheless, as a commission of inquiry, the legal status of the perpetrator findings were unclear and there did not seem to be sufficient political will to follow up on the cases of perpetrators who were denied amnesty, or failed to apply.

Moreover, the latent ‘truth’ considered to be outside the realm of official inquiry were violations of socio-economic rights. This is not to say that the TRC did not take account of their significance. To the contrary, the TRC did recommend a range of structural and institutional reforms with careful detail spanning from land reform, justice, safety and security and police reform. However the TRC’s official discourse on apartheid’s violence limited its focus to the ‘gross violations’. Since the publication of the TRC’s findings there has been no systematic effort by the ANC government to implement its recommendations.

Colin Bundy suggests the effect that this discourse had on the way South Africans have come to think about what is legitimate in society.

“The TRC could not come to terms with the underlying structures and processes that have determined our identities and patterned our society. Because of its mandate, we may run the risk of defining a new order as one in which police may no longer enjoy immunity to torture opponents of the government, but fail to specify that ordinary citizens should not be poor and illiterate and powerless, or be pushed around by state officials and employers.”²⁷⁹

Hence, it has also been suggested that the Marikana ‘tragedy’ may be seen as a consequence of the ANC government ignoring the recommendations that the TRC put forward.²⁸⁰

5.2 The Marikana Commission investigating the ‘truth’

For Michael Bishop, the Marikana Commission “was always about more than fact-finding”.²⁸¹ He cites the commission’s motto ‘Truth, Restoration and Justice’. It was this motto that incited the initial questions that set this thesis in motion. In what capacity could the Marikana Commission make claims to official ‘truth’, ‘restoration’ and ‘justice’? As stated in the introduction, the Marikana Commission was set up as a regular ‘fact-finding’ commission, as provided by the Commissions of Inquiry Act of 1947,²⁸² tasked to investigate “the *tragic incidents*” at the Lonmin Mine in Marikana with a view to making

²⁷⁹ Bundy cited in Emiliios Christodoulidis and Scott Veiton, “Reflections on law and memory”, in Susanne Korsted (Ed.) *Legal institutions and collective memory* (Bloomsbury Publishing, 2009), p. 69

²⁸⁰ See Fanie du Toit, “Marikana Victims Deserve Justice” *Cape Times*, November 27, 2013. Du Toit is the Director of the Institute for Justice and Reconciliation.

²⁸¹ Bishop, “An Accidental Good: The role of Commissions of Inquiry in South African Democracy”, npg

²⁸² “The Commissions Act, 1947 (Act No. 8 of 1947) shall apply to the Commission, subject to such modifications and exemptions as may be specified by proclamation from time to time.” Marikana Commission Terms of Reference. Section 1 (2)

recommendations of criminal and civil liability.²⁸³ It could also refer a matter for further prosecution or investigation.²⁸⁴ The Commission was split into two phases: phase one was to deal with what Chapman and Ball called the ‘micro truth’ – specifically the week that led up to the 16th August 2012. Phase Two was to investigate the ‘macro truth’ – the long term causes such as the migrant labour system, the role of the mining sector and the broader implications of the relationship between the state, labour and mining capital.²⁸⁵ What was set up as an ‘event-specific’ commission started to adopt the role of an Historical, Sectoral or Truth Commission.

It is important to note that, despite its motto, the Marikana Commission’s terms of reference made no mention of ‘truth-telling’, ‘restoration’ or ‘justice’. Due to its status as an official investigative commission, part of its role involved hearing the testimony of witnesses and families of the deceased miners within a public forum. However, the apparent aims and official discourse of ‘truth-telling’, justice and ‘restoration’ or healing was undermined by the requisite methodology to fulfil the commission’s legal mandate of objective fact finding. Interestingly, an attorney working on the team of the Legal Resources Centre (LRC) stated, correctly, that the legislation that defines commissions of inquiry in South Africa “*has no transitional justice element*”.²⁸⁶ When compared to the

²⁸³ *Marikana Commission Report*, Chapter 1 Section 1.1 [Emphasis Mine]. The Marikana Commission, like the TRC, was specifically tasked to investigate the behaviour of agents and apportion responsibility for the events that unfolded in terms of “whether by act or omission [any party or individual] directly or indirectly caused loss of life or damage to persons or property”. The key role players included the South African Police, the labour unions NUM and AMCU, the Department of Mineral Resources (DMR) and Lonmin Mine. *Marikana Commission Report*, Chapter 1 Section 1.1

²⁸⁴ “The Commission shall where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of a certain person/s.” *Marikana Commission Report*, Chapter 1 Section 1.3 (5)

²⁸⁵ See Fine, B. and Rustonjee, Z. *The political economy of South Africa: From minerals-energy complex to industrialisation* (London: Hurst, 1996)

²⁸⁶ Interview with Michael Power, April 2015 cited in Olivia Walton “The Marikana Commission: Truth and Voice in official Documentation” University of Oxford Thesis. p. 26

PNUR Act that established the TRC and its provisions facilitating full disclosure and reconciliation, the Commissions Act provides limited space for public ‘truth-telling’ or the acknowledgment of victim-centred personal, narrative or dialogic truth.

One can actually point to more similarities between the Marikana Commission and the JRC and the Wessels Commission. Victim participation at the Marikana Commission was severely constrained. As Fanie du Toit wrote, “victims appear to struggle to make their voices heard and participate fully for a lack of funding, whereas the police, with state money, can afford to hire a range of top silks.”²⁸⁷ The lack of funding to which du Toit refers concerned funding for legal representation.

In general the Marikana Commission defaulted to the ‘regime of truth’ constituted by legal approaches and forensic argumentation. Like the TRC’s amnesty hearings, the Marikana Commission’s investigative phase resembled a quasi-judicial process. The effect on the Commission’s process resonates with Van Krieken’s assertion on ‘truth’ and the court of law -- that there were no extra-legal truths, and no facts with autonomous status, from the perspective of the Marikana Commission. Indeed, ‘truth’ was conceived as knowledge either in favour of one party or another. I shall use the example of the testimony of one of the surviving miners, Mzoxolo Magidiwana, who was himself shot multiple times by the police on the 16th August 2012, as a focal point from which to reach some conclusions.²⁸⁸

Magidiwana was subjected to days of cross-examination, where his statements were questioned and probed as to their truth and validity, particularly by SAPS attorneys. Like

²⁸⁷Fanie du Toit, “Marikana Victims Deserve Justice” *Cape Times*, November 27, 2013. Du Toit is the Director of the Institute for Justice and Reconciliation.

²⁸⁸Magidiwana’s testimony at the Commission began on 26th February 2013. He was born in Kanya Village in the Eastern Cape and was 23 years old at the time of the massacre. The Marikana Commission of Inquiry. *Transcript*. Day 61

the local Sharpeville witnesses at the Wessels Commission, when Magidiwana gave testimony at the Commission he was not only a man bearing witness; he was an alleged criminal.²⁸⁹ Ngalwana, one of the SAPS attorneys, stated repeatedly that Magidiwana could be judged a liar, saying “if you fail to tell the truth and you are discovered, you will have committed a criminal offense”.²⁹⁰ Although Farlam intervened stating that “anything you say *cannot* be used against you if you were subsequently charged,”²⁹¹ the framing of the commission’s proceedings as an adversarial trial encompassed an effective scheme of legitimation that made Magidiwana’s ‘truth-telling’ appear to carry similar weight. In this sense, the commission engaged in the same performance, or ritual, of legal tradition seen in other ‘tumult commissions’.

At one stage of his cross-examination Magidiwana was shown footage of the shooting and was asked whether he could see that the police were retreating. As he watched the footage, Magidiwana responded, “Sir, these police officers are shooting and this person is falling and as this person is falling, he is facing the road.”²⁹² However, as he began recounting his own narrative of events he was cut short when Judge Farlam reminded him that he had not answered the question. Fraught with distress, Magidiwana banged his hand on the table. He was reprimanded for this, and he then began to cry. Clearly, the Marikana Commission’s ritual was quite unlike that which Boraine depicts in his account of the TRC victims hearings -- devoid of ‘stern-faced officials’ to probe narratives. To the contrary, although like the TRC the Marikana commission promised ‘truth, restoration, and

²⁸⁹ The Marikana miners were charged with common purpose murder after the Massacre. These initial charges laid by the SAPS were later dropped., See Walton, *Truth and Voice*.

²⁹⁰ The Marikana Commission of Inquiry. Transcript, Day 54

²⁹¹ Ibid.

²⁹² The Marikana Commission of Inquiry. Transcript, Day 59

justice'; it is clear that the regime of truth in which it operated was 'truth as objective fact', which relied on the forensic procedure and principles of a courtroom to legitimate its findings.

But, the Marikana Commission also represented unresolved tensions, reflecting broader unresolved tensions in South African society. It was the first 'Tumult Commission' to occur in democratic South Africa, and indeed, post-TRC South Africa. Its context is a South Africa whose laws are subject to a justiciable Constitution and bill of rights, where citizens are aware of their rights, including the right to 'free speech'. Unlike Ashforth's 'grand tradition' of 'Native Question' commissions of inquiry that functioned to (re)produce colonial state power, the Marikana Commission was utilised, by some, as a platform from which to challenge the 'official' narrative of events maintained by the police. The actual proceedings revealed the contradictions of an official process subscribing to objectives of 'truth-seeking, justice and restoration', but whose terms of reference were concerned with responsibility for political violence only. It became clear that Police Commissioner Riah Piyegea lied at the Commission, and failed to produce important evidence.²⁹³ And as Evidence Leader Adv. Geoff Budlender stated in a personal interview, it is widely acknowledged that "the police had constructed a version [of the events] which wasn't the truth."²⁹⁴

²⁹³As lawyer Miriam Wheeldon stated "there is an image of the be-medalled, the be-uniformed Riah [Piyegea] sitting there essentially not answering anything for a month." Personal Interview cited in Walton, "The Marikana Commission", p.44

²⁹⁴ Interview with Geoff Budlender, April 2017 cited in Walton, 'The Marikana Commission', p. 44. For a legal analysis of the Marikana Commission of Inquiries findings see David Bruce "Summary and Analysis of the Report of the Marikana Commission of Inquiry" *The Council for the Advancement of the South African Constitution (CASAC)* 2015

This was at odds with the Marikana Commission's final report. The report presented a strange hybrid of the TRC discourse of truth-telling and accountability, whilst at the same time remaining faithful to the discourse of tragedy characteristic of 'Tumult Commissions' that attempted to exonerate the police from accountability for the taking of lives:

"It is understandable that an institution would attempt to shield itself from criticism in a situation such as this, and that it would be reluctant to invite criticism by explicitly or implicitly acknowledging mistakes that were made. That, however, is what is required of the SAPS. It has a *duty of public accountability and truth-telling*, because it exercises force on behalf of all South Africans, and all South Africans are entitled to know *whether what was done in their name was justified*."²⁹⁵

To do this, the Commission engaged many lawyers (nearly sixty at one point), resulting in lengthy cross-examinations and disputes over due process. Certainly, the involvement of legal experts was essential to identify the untruth of the police's testimony. However, as the Commission carried out its work the ambiguity of its status and function worsened, especially in the understanding of participating witnesses. The passage below exemplifies this, when Magidiwana, under cross-examination, began to pose questions and accusations at the attorney questioning him.

MR MAGIDIWANA: Is it not true that on certain days you ask the same things and not ask everything on the same day, others you ask later.²⁹⁶

MR NGALWANA: It is irrelevant; I'm not going to answer your questions. Please answer my question.²⁹⁷

²⁹⁵ Marikana Commission Report. Chapter 13, 'The Plan, its Defects and Execution'. Section 1101 [Emphasis Mine]

²⁹⁶ Note that this has been translated from isiXhosa, and therefore may not be an identical representation of what Magidiwana meant. However, this is from the transcription of the proceedings.

²⁹⁷ The Marikana Commission of Inquiry, Transcript, Day 58

And on another day,

MR MAGIDIWANA: Yes, You have a reason to talk like that, Sir, because you defend the people that you know they are criminals.

CHAIRPERSON: Mr Magidiwana... It's not appropriate for you to say that he knows that his clients are criminals; he knows that the case he is putting up is a bad case. That's not your function to do that. At the end of the day when we've heard all the evidence and heard all the arguments, *we will decide* whether the police have behaved as badly as you say they have, whether they are criminals, or we may have to make similar findings about other people. But it's for us to make the findings at the end, it's not for you to just gratuitously throw around comments like that. Please answer the questions you're asked.²⁹⁸

It seems that the Marikana Commission of Inquiry was characterised by the same impasses and ambiguities in status and function that plagued the TRC. The Commission was not a court of law. Yet, as an investigative commission, the officials attempted to steer the proceedings to follow legal protocol in order to authorise the Commission's eventual findings to speak truth *with* power, as made evident in Judge Farlam's statement "we will decide". Nonetheless, Magidiwana directly challenged the conventional protocol by engaging in a re-negotiation of power in terms of what for him was a more democratic space in which he could speak truth *to* power. Farlam was ostensibly clear that it is not Magidiwana's 'function to do that'. To accord with the Commission's official legitimating scheme, Magidiwana's function was to serve as a mere vessel from which 'truth as objectivity' could be extracted and scrutinised to support an officially validated narrative of events. However, Farlam's insistence that "we will decide whether the police...are criminals" raises critical questions concerning the role and function of the Commission.

²⁹⁸ The Marikana Commission of Inquiry, Transcript, Day 61 [emphasis mine]

As was the case with the legal status of the TRC's perpetrator findings, the same question holds concerning the findings of the Marikana Commission. Is it appropriate for a Commission of Inquiry, as an investigative body and not a legal tribunal, to make findings of criminal liability? It seems that it is not. It is unclear what the relationship is between these findings -- made in general terms, i.e. that SAPS is collectively responsible -- and their application to individual cases of criminal liability. To recall Mill's impassioned statement on the findings of the JRC, as a principle of government by law, when there is evidence that lives have been "improperly taken", only a court of law, or a criminal tribunal, can determine the criminality of an individual, and determine his or her proper punishment.

5.3 Old Grains from new Husks

As a heuristic, Sitze's notion of 'Tumult Commissions' remains useful to capture the practise of implementing official investigations to establish 'the truth' concerning unlawful state killings and their particular whitewashing function of exonerating the security forces from accountability. Each account -- in the reports of the JRC, the Wessels Commission, the TRC, and now, the Marikana Commission -- traversed a great deal of ground, exemplifying major shifts in historical and political context. Despite the altered contexts, these 'Tumult Commissions' each confronted the intractable and profound problems involved in how societies choose to deal with basic issues of truth and accountability. Another diachronic issue is that of contested sovereignty of the law vis-a-vis the state, in providing for the security of human life.

Following the chronology of 'Tumult Commissions' might provide different vantage points from which to trace the (re)emergence of unresolved contradictions across social

epochs. In reckoning with a perceived social problem, while seeking possible solutions for the future, the state availed itself of the juridical forms at hand, in accordance with what was practical and politically expedient given the particular political context. With reference to Luxemburg's beautiful metaphor of 'new grains breaking through old husks' cited above, and in light of the recent Marikana Massacre that saw security forces shooting some 40 striking mineworkers, and described as "arguably... the most devastating single event in the history of South Africa since 1994,"²⁹⁹ one must ask the question whether the 'new movement' did find its own forms and language to respond to the Marikana massacre. Significantly it is referred to, not as a 'massacre' but as the Marikana *tragedy* in official discourse? The term 'massacre' itself became contested at the Commission and parties at the Commission were obliged to use the term *tragedy*, which implied a more neutral stance on judgements of blame. Judge Farlam stated: "whether it's a massacre is a matter *we'll decide* at the end of the day."³⁰⁰ More generally the question is whether, or to what extent, the TRC initiated a more open and inclusive politics of truth in official approaches to reckoning with state sanctioned violence in the suppression of civic action? The TRC evidently left an irrevocable imprint upon the narrative of the Marikana Commission, in its choice to invoke the official discourse of truth, restoration and justice that framed South Africa's transition. This reveals an explicit attempt to counter and alleviate public critiques of the Commission.

The Marikana massacre ruptured the narrative that 'gross human rights violations' inflicted by the state are a thing of the past and the Commission was an official attempt

²⁹⁹Frankel, P. *Between the rainbows and the rain: Marikana, migration, mining and the crisis of modern South Africa*. (African Books Collective, 2013), p. 26

³⁰⁰ Judge Farlam cited in David Bruce, "Marikana: A Massacre by any other name" *Mail and Guardian*, August 14, 2015 [Emphasis Mine]

to narrate and to understand that rupture. The few who have written on the topic to date, such as Peter Alexander, have referred to the event as a “vantage point” -- an event involving “sequences of activity released by ruptures” providing a position from which to examine deeper causal currents, and at the same time make predictions of their long-term effects.³⁰¹ Scholars of political economy argue that the root causes of the miners’ strike is the structure of South Africa’s mining industry: its predatory labour practices and the vile working and living conditions for miners,³⁰² while these conditions are posited as a direct legacy of the colonial era and the Apartheid regime.³⁰³ The conditions of migrant labourers in South Africa remain much the same despite the transition to democracy.³⁰⁴

Unfortunately, the Marikana Commission of inquiry never reached phase two due to insufficient time.³⁰⁵ This was the phase in which it was to focus on the systemic causes, or the ‘macro-truth’, that may have contributed to circumstances that catalysed the massacre as well as on the question of financial compensation for the families of deceased miners. On this point, the Commission report’s feeble response was that it was “*not satisfied* that its terms of reference are wide enough to cover the question as to whether a compensation

³⁰¹Peter Alexander, “Marikana, turning point in South African history”. *Review of African Political Economy*, (2013) Vol. 40, No. 138, p. 607

³⁰² See Chinguno, “Marikana and the post-apartheid workplace order,” *Society, Work and Development Institute (SWOP) Working Paper*, Vol. 1 No. 1 (2013); Bond and Mottiar, S, “Movements, protests and a massacre in South Africa.” *Journal of Contemporary African Studies*, Vol. 31, No. 2 (2013): pp.283-302

³⁰³See Ben Fine and Rustumjee, Z, *The political economy of South Africa: From minerals-energy complex to industrialisation*(London: Hurst, 1996); Frankel, P.H, *Between the rainbows and the rain: Marikana, migration, mining and the crisis of modern South Africa* (African Books Collective, 2013)

³⁰⁴ “For too long the South African transformation conversation is caught up in the narrow confines of employment equity plans for management and the inclusion of previously disadvantaged people on the boards of corporate SA. While this aspect of transformation may have some relevance, it fails dismally to confront the real, day by day on the rock face challenges of transformation between the front line supervisor and the employee” Hartford, G, “The Mining industry strike wave: what are the causes and what are the solutions?” Presentation at the Marikana Commission of Inquiry. [<http://www.marikanacomm.org.za/exhibits/Exhibit-XX-7.pdf>]

³⁰⁵This is despite the fact that the original time in which to conduct the commission was extended seven times between 31 January 2013 and 14 November 2014 by presidential decree.

scheme of the kind proposed should be implemented by the State.”³⁰⁶ Consequently, families of the deceased still engage in legal struggles with the assistance of various Non-Governmental Organisations to attain some sort of compensation. Instead, the discourse of tragedy became the official discourse once again. As Cyril Ramaphosa said at the Commission:

“The tragedy that has occurred at Marikana has to be approached as a collective failure, by many role players, many stakeholders. And I don’t think that many who had some role to play can say that they do not bear any form of responsibility. I think the responsibility has to be collective and as a nation we should dip our heads and accept that we did fail the people of Marikana, particularly the families and the workers and those who died. We did fail them.”³⁰⁷

Invoking the tragic narrative whereby everyone was the blame, and hence, no one was to blame, suggests that the Marikana Commission was indeed a ‘whitewashing’ machine used as a tool to legitimate the ‘truth of state’.

Moreover, based upon the ANC government’s dismissive behaviour towards the miners and families of the deceased both during the Commission as well as since, it does not appear that the ANC government used the Commission as an opportunity to engage in genuine self-reflection. The latent ‘truth’ is that millions of South Africans continue to suffer gross socio-economic deprivation and civic protests are daily occurrences. As the ANC government feels increasingly threatened by political faction and widespread social unrest for matters from wage increases to university fee cuts, it is not clear that the ‘truth’

³⁰⁶Marikana Commission Report. Chapter 23: ‘Proposed Recommendations with Regard to Compensation’, p. 518

³⁰⁷ Cyril Ramaphosa. The Marikana Commission of Inquiry. Transcript. Day 272.

offered by the Marikana Commission of inquiry will be sufficient to provide justice, nor to prevent another massacre of this kind from happening again.

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